

BOOK REVIEW

Our Divine Constitution

IN THE WHIRLWIND: GOD AND HUMANITY IN CONFLICT

By Robert A. Burt

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INTRODUCTION

Theology matters for law. This is not just because many Americans are religious, although ours is a relatively religious nation. It is also because religious thought has played a crucial role in developing Western political and philosophical ideology, providing a great number of the symbols and narratives we use to talk about questions of justice, equity, and moral progress. The United States Constitution has often been analogized to a religious document, and its promises cast as covenantal. Religious iconography—providence, faith, renewal, and redemption—is thus an attractive way of describing the process of American constitutional reform.

If we are going to speak theologically, however, we must be willing to pay the piper by casting a critical eye on the lessons our religious traditions have to teach us. The presumption that God is omnibenevolent—inherently just, wise, kind, and merciful—is so pervasive as to be almost a tautology. Were God not just, God would not be God. Yet both Jews and Christians adhere to a Bible that often seems to portray God in a far more sinister light. The God of the Bible—not always, but sometimes—engages in murder, sexual violence, cruelty, and genocide. This God behaves in ways incompatible with basic ethical norms, including those fundamental to Jewish and Christian religious practice.¹ This aspect of God's character

1. I resist using the term "Judeo-Christian" in this Review because I believe it wrongfully conflates two distinct and separate religious traditions. Jews do not recognize the legitimacy of the foundational Christian text, the New Testament, and Christians ascribe limited (if any) weight to Jewish Talmudic authority, which is an essential part of Jewish theology. Because Christians vastly outnumber Jews, the upshot tends to be a marked absence of the "Judeo-" in "Judeo-Christian," which instead almost invariably refers to a particular orthodox Christian perspective which may or may not have anything in common with current Jewish practice.

is perpetually marginalized, downplayed, or outright rewritten to fit within a conventional narrative that cannot contemplate any ambiguity in God's moral character. Professor Robert A. Burt's *In the Whirlwind: God and Humanity in Conflict*² is an effort to get back to God's roots—an unflinching and unapologetic look at how God is presented in the Bible and how humans and God together manage and mediate a relationship that is constantly under stress due to shortcomings on both sides. More than a theological account, though, Burt also presents his take on the “political theory” of the Bible—one that shies away from perfect justice in favor of maintaining a healthy dynamic within a polity that is presumably invested in its perpetuation. Burt extends this observation to constitutional law, which also gains its force not from an absolute right to claim obedience, but rather from the relational standing by which American citizens come into contact with the Constitution. Our faith in the Constitution, like our faith in God, cannot be predicated on the idea that these sovereigns are always behaving in a perfectly just manner—even as that very belief tries to ingrain itself inside us again and again, rooting out dissent and dissensus. Rather, our relation exists because we find it meaningful even in spite of persistent, mutual failings—failings that we should try to correct. A faithful theological and constitutional relationship is a relationship that will see considerable protest; that protest is an expression of commitment, not apostasy.

This Review proceeds in three parts. Part I summarizes Burt's essential argument regarding God's presentation in the Bible, and its implications for modern political and legal theory.³ God is continually presented as neither infallible nor perfect, but rather as flawed and vulnerable. God desires a genuine relationship with humankind, but is unsure of his ability to maintain it and often times seems to break his end of the bargain. The story of the Bible is not one of God setting out an ideal of perfect behavior that humankind perpetually falls short of

2. ROBERT A. BURT, *IN THE WHIRLWIND: GOD AND HUMANITY IN CONFLICT* (2012). Future citations to this book are placed in the text of this Review.

3. Though Burt includes chapters about the New Testament and Jesus, I focus exclusively on his explication of the Tanakh for several reasons. First, my approach is a Jewish one and relies heavily on Jewish theological literature, such as the Talmud, which is not appropriately applied to Christian texts. Second, not being Christian and having no independent expertise in Christianity, I do not feel qualified to opine on the accuracy of Burt's account vis-à-vis Christian scriptures; since I dislike when Christians instruct Jews on what Judaism “really” is or means, I will refrain from doing the same to them. Third, grouping the New Testament as relevant commentary on the Tanakh is a fundamentally Christian way of looking at things, as Jews don't accord the former as having any authoritative bearing on the latter. Hence, using it even as an interpretative gloss would simply muddy already unclear waters.

meeting. Rather, it is a story of two parties who both sincerely desire a full, fruitful, and meaningful relationship, but who both sometimes fail to do their part. As a matter of political theory, Burt suggests that the Bible counsels a focus less on the achievement of “perfect justice,” and more on the constitutive effects of maintaining a relationship of meaning—a covenantal relationship—in the face of a history of breaches and shortcomings. The claim is not that God is inherently malevolent; this is as false as the traditional account of God as perfectly munificent. Rather, the claim is that, like humankind, God *can* behave in a destructive or unjust manner, and the political dynamic between God and humankind is for each to press the other into making right and just choices. The great heroes of the Bible—such as Abraham, Moses, and Job—are those who challenge God, and the closest we do get to divine/mortal harmony is when both God and humankind are willing to listen to the pleas and concerns of the other with respect.

Part II is primarily theological. It contextualizes some of Burt’s arguments with regard to “protest theology,” a theological school that focuses on claims humankind can make against God when God behaves unjustly or in ways inconsistent with his promises. Burt’s methodology is almost exclusively textualist, paying very little attention to the (massive) literature that provides commentary and explanation of every word and letter of the Biblical text. However, as unorthodox as Burt’s argument may seem, it can claim to be part of a rich heritage of Jewish theological argument. Protest theology rejects the often axiomatic assumption that God is always good or just (eutheism). More to the point, it holds that the eutheistic outlook not only stunts our ability to have a true, meaningful relationship with God, but that the theological contortions it demands also cause us to miss several important themes and lessons latent in the Hebrew Bible.⁴

Part III then explores what protest theology tells us about constitutional law. It first observes that the Constitution seems to occupy a similar place in America’s political imagination as God does in our religious imagination. The Constitution is, in a real sense, a sacred text, whose commands are more than just technical mandates and proscriptions, but normative obligations as well. Like the God of the Bible, it is seemingly inconceivable that the Constitution could *command* evil—tolerate it, perhaps, but not require it. To be told that one’s conduct violates, for example, the Equal Protection Clause is a

4. Protest theology has well-established roots throughout Jewish history, but it gained particular weight in post-Holocaust Jewish theology, which, for obvious reasons, is particularly concerned with restoring a ruptured relationship between God and humankind. See *infra* Part II.

profound chastisement—more than would seem justified if the Constitution did not have this moral authority.

And yet the Constitution, at least as interpreted by the courts, sometimes *does* seem to command wrongdoing—not just permit it, but command it. If one believes that racial integration is an incumbent moral obligation, *Parents Involved* does not just permit schools to resegregate, it forbids states from taking race-conscious action to integrate them.⁵ If one believes that fetuses are human beings with full rights and dignity, *Roe v. Wade* does not just permit abortion, it forbids states from protecting the unborn.⁶ In making these decisions, the Constitution creates a sharp sense of dissonance within persons who possess faith in the Constitution's justness, but whose basic moral commitments are written out of the Constitution's protections. We trust the Constitution as an exponent of important shared values, like "equal protection" and "due process," yet we sometimes find our own conceptions of these values standing at odds with official or popular understandings of the relevant constitutional provisions. The precarious nature of that situation is sometimes understated by persons with too much faith in the processes of constitutional faith—the belief that constitutional dissidents can hold fast to dissenting views of what the Constitution requires in the face of sustained effort to place their views beyond the folds of America's basic covenantal charter. Social movement theories of constitutional change sometimes do not give due accord for the way that the Constitution, in practice, maintains power over us.

One can respond to this reality in several ways. One answer is to argue that these decisions were legally wrong—the "real" Constitution would and could not tolerate them. Another answer is to deny that these decisions are ethically wrong—downplaying their immoral character on the assumption that there must be some redeeming factor or justification sanctioning a constitutional command. A third answer is that we are wrong to believe our Constitution has or should have any moral force whatsoever—it is a positivist document, nothing more. But the fourth answer is to neither cede the moral terrain nor deny the potentiality of the Constitution toward evil. Rather, it is to throw ourselves back into

5. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

6. 410 U.S. 113 (1973). If, as some pro-life advocates promote, the Fourteenth Amendment ought properly be understood as encompassing and protecting fetuses and embryos, see, e.g., Basile J. Uddo, *The Human Life Bill: Protecting the Unborn through Congressional Enforcement of the Fourteenth Amendment*, 27 LOY. L. REV. 1079, 1083 (1981), then the Constitution would not just allow restrictions on abortion, but also forbid recognition of what pro-choice activists believe to be an essential element of women's reproductive autonomy.

the fray of constitutional construction, engage in a constitutive project that creates constitutional meaning, and provide alternatives. The project has life not because bad constitutional decisions are “wrong” or not truly faithful expositions of constitutional meaning. The Constitution is capable of possessing a meaning that is true, genuine, faithful, and malignant. But this is not inevitable. Constitutional faith is nothing more than the belief that the Constitution *can be appealed to* in the language of justice—that justice is a possibility, not an inevitability.

I. THEOLOGICAL FOUNDATIONS: GOD IS NOT A STRANGER

Burt begins by laying out the “core claim of modern, secular Western political theory”: “No authority, whether divine or secular, deserves automatic obedience. All authority must justify itself by some extrinsic standard of justice or righteousness” (p. 1). This, Burt admits, runs counter to general theological accounts that mandate obedience to God simply because God is God. *In the Whirlwind* is an attempt to argue that this latter account is wrong, not just as a matter of secular political theory, but as an improper reading of the Biblical texts themselves. From there, he doubles-back on the political question, using the Bible to approach questions of politics as questions of maintaining healthy relationships among imperfect actors, not finding a perfect set of principles that promises complete and timeless harmony.

A. *The Theological Account*

The Talmud (“oral law”) struggles over why humankind was created. The House of Hillel and the House of Shammai debated over whether or not it would have been better for humankind to have not been created—with Hillel saying it was better that humankind was created, and Shammai arguing the opposite. One can see the traps in both sides of the argument. On the one hand, Hillel’s position implies that humans and God are equal (else the addition of human imperfection would obviously dilute divine perfection). On the other hand, Shammai’s position implies that God acted in a way that was not “best” for the universe. Ultimately (in what any scholar of the Talmud knows is quite the upset victory) the House of Shammai prevailed—it would have been better had humankind not been created, but now since we were created, we should scrutinize our actions to act as justly as possible.⁷

7. BABYLONIAN TALMUD, ERUBIN 13B (Jacob Neusner ed., 2011). It is an “upset” victory because the House of Shammai’s position is almost never accepted over that of Hillel, though both are accepted as “words of the living God.” See *infra* note 167.

Burt provides another answer: God needs humans. The relationship between humankind and God is reciprocal, because God is incomplete and missing something without human love and care. This, in turn, represents a transfer of power from God to humankind, for “however much he wished for a relationship with humans, to that extent he had ceded power to them” (p. 31).⁸ Biblical narrative is a prolonged explication of the tension between this need by God and God’s anxiety about the weakness it implies in him.⁹ Through Genesis, as Burt notes, God seems to struggle more and more in his ability to maintain a direct and sustained relationship with humankind (p. 91). God at times regrets having created humankind (p. 58, citing Genesis 6:5–7), but then reverses course and accepts that to have a relationship with persons means accepting the possibility, even the inevitability, that they will fall short of perfection. In the Book of Samuel, God accepts the Israelites’ desire to have a (human) king with a sense of wounded pride, telling Samuel “it is not you they have cast aside but Me” (p. 36, quoting 1 Samuel 8:7–10).

It is hardly a novel contribution to say that humans often fall short in their duties to God. Where Burt shines (and provokes), however, is in his assertions that God sometimes falls short with humankind. Though he provides a systematic defense of this thesis running through the entire Tanakh and New Testament, this Section focuses on his exploration of three key characters: Abraham, Moses, and Job.

1. Abraham

Abraham is generally considered the first Israelite, departing his ancestral lands in exchange for God’s promise that he will found a great nation—the eventual Jewish people. Nonetheless, the relationship between Abraham and God was exceptionally fraught, with Abraham having “good reason for mistrusting the reliability of God’s promise to him” (p. 68). God’s promise to Abraham is specifically enacted through his seed, yet God’s actions vis-à-vis Abraham seem explicitly aimed at

8. Rachel Adler makes a similar point in her analysis of the marital relationship between Israel and God as portrayed in the prophets—it renders God an “injurably other” who is capable of being hurt and wounded by humankind when humans withhold their love. Rachel Adler, *The Battered Wife of God: Violence, Law and the Feminist Critique of the Prophets*, 7 S. CAL. REV. L. & WOMEN’S STUD. 171, 191–92 (1998).

9. I deliberated for quite some time about what pronouns to use to refer to God in this Review. On the one hand, I am in general agreement with feminist criticisms of referring to God in a masculine form as contributing to sexist theology and implicitly justifying gender hierarchy. On the other hand, given the protest theology model that accuses God of engaging in, among other things, sexual violence, abuse, and rape, it feels incongruous to suddenly switch and treat God as feminine.

causing Abraham to question whether God's promise will ever come to fruition.

To be sure, Abraham is no saint. His fearfulness that God will not truly protect him leads him to offer up Sarah as a sexual partner to foreigners to protect his own life (in fact, he does this twice).¹⁰ This mistrust, however, is not groundless. God's promise is explicitly tied to the fate of Abraham's descendants, and yet God deals with Abraham's children in a manner bordering between cavalier and cruel: Lot is, as far as Abraham is aware, killed at Sodom (certainly God seems indifferent to the prospect until Abraham intercedes); Ishmael is banished to the wilderness; and Isaac is to be sacrificed. All of these events share a commonality: "God takes a direct hand in commanding these [near] deaths but . . . Abraham is somehow implicated in the deed" (p. 69). Abraham accedes, albeit reluctantly, and all he receives is a "reiterat[ion] of the promise [God] (seemingly) had already made" (p. 70)—in effect, a signal of God's ambivalent swaying as to whether the bond between God and humankind is worth preserving.

Abraham's behavior is notable for the behavioral contrast—really continuum—he displays between Sodom and Gomorrah, the banishment of Hagar and Ishmael, and the *Akedah* (binding of Isaac). When informed of the impending destruction of Sodom, where his nephew and adopted son Lot resided, Abraham responds with astounding boldness. He "stood yet before the Lord"—actually, God stood before him¹¹—and neither cowered nor flinched. He did not reflexively defer to God's authority. Instead, he challenged God on the grounds that there may be innocents in the city, and "[f]ar be it from You to do such a thing, to put to death the innocent with the guilty, making innocent and guilty the same. Far be it from You! Will not the Judge of all the earth do justice?" (p. 71, quoting Genesis 18:25). A progressive bargaining session ensues where Abraham continually pushes the number of required innocents down, with God only conceding precisely up to the point Abraham pushes him. With each iteration, Abraham's courage falters further; he is only able to talk God down to ten before he ceases the discourse.¹² In this respect, Abraham

10. *Genesis* 12:13–15; 20:2.

11. See *infra* notes 121–24 and accompanying text for a discussion of *kethib/qere*, which accounts for the divergence between the actual written text and the traditional formulation in this context.

12. Compare *Genesis* 18:22–24 ("[B]ut Abraham stood yet before the LORD. And Abraham drew near, and said, 'Wilt thou also destroy the righteous with the wicked? Peradventure there are fifty righteous . . .'"); *Genesis* 18:27 ("Behold now, I have taken upon me to speak unto the Lord, which am but dust and ashes . . ."); *Genesis* 18:30 ("And he said, 'Oh let not the Lord be angry, and I will speak . . .'"); *Genesis* 18:31 ("And he said, 'Behold now, I have taken upon me

stands up to God—only partially and falteringly, but he does it nonetheless. If, as Burt hypothesizes, what is being “tested” here is “whether any human being could assist [God] in balancing his own conflicting impulses toward humanity” (p. 73), Abraham’s conduct was at least a partial success. Abraham is cast in the role of the rainbow, “to remind [God] of his vow to himself” (p. 73).

When Sarai¹³ demands that Hagar and Ishmael be thrown out, Abraham too protests—“the thing seemed evil in Abraham’s eyes because of his son” (p. 76, quoting Genesis 21:11). But God contradicts this, instructing Abraham to accede to Sarai’s wishes. Abraham did not “stand yet before the Lord”—he complied, and his son and concubine were cast out to what Abraham could only assume was a wandering death (though they were in fact saved by God, Abraham did not know this and he never saw Ishmael again) (p. 76). His initial protest having fallen on deaf ears, he complied in silence.

The *Akedah* marks the end of this awful journey. Abraham is utterly silent in the face of God’s demand that he sacrifice “your son, your only one, whom you love, Isaac” (p. 76, quoting Genesis 22:2). He makes no protest, in fact he says nothing at all. He has apparently given up entirely. Abraham may well believe that Lot and Ishmael are dead (an intuition God subtly reinforces by calling Isaac “your only one”), and presumes that God is finally and with finality revoking his promise to give unto him a great nation (p. 77).¹⁴ As Abraham is about to sacrifice Isaac, God intervenes, Abraham relents, and God promises that his seed will be multiplied as a reward for his obedience (pp. 78–79).

And that is it. Though Abraham lived for forty years after the *Akedah*, God and Abraham never speak again, and neither do Abraham and Isaac (pp. 79–80). This silencing is itself a repeated theme in the Bible.¹⁵ God largely stops speaking to Jacob after their infamous struggle (pp. 88–91), and does not speak to any of Jacob’s descendants until the time of Moses. “In living through the actual event, Abraham’s descendants must have felt entirely abandoned—at least those who lived through the four centuries of slavery and affliction. If they had been told of God’s promise to Abraham, God gave them no sign of

to speak unto the Lord”); and *Genesis* 18:32 (“And he said, ‘Oh let not the Lord be angry, and I will speak yet but this once: Peradventure ten shall be found there.’”).

13. Sarah is still known as Sarai at this point in time (p. 76).

14. Abraham is mostly silent on the journey with Isaac up until his hand is raised for the slaughter. Abraham responds to Isaac when he asks from where the sheep will come for the offering (albeit evasively). See *Genesis* 22:7–8.

15. See *infra* notes 154–64 and accompanying text (noting the implications of the last time God speaks with *any* human in the Hebrew Bible—at the conclusion of the Book of Job).

remembering this promise or remaining committed to it” (p. 92).

2. Moses

No character in the Hebrew Bible is as intimately close with God as Moses. This is not through a lack of effort; something was missing from God’s efforts with Abraham that Moses was able to achieve. But what?

Moses’s first words in the Bible are to intervene in a fight between two Hebrew slaves. This follows Moses slaying an Egyptian overseer who had been beating an Israelite; the aggressor in the later brawl replies by asking “intendest thou to kill me, as thou killedst the Egyptian?” This revealed to Moses that Pharaoh knew he killed the Egyptian, causing Moses to flee into exile—a twist reminiscent of Cain, but unlike Cain, Moses’s act was in pursuit of justice (pp. 96–97, citing Exodus 2:11–15). This selfless act triggers God to re-engage with humanity—but it is unclear that Moses is interested. Unlike his predecessors, for whom God was acting to forgive prior wrongdoing, Moses “did not appear to need forgiveness for any real or imagined offense [T]he issue appeared to emerge whether God would be forgiven by Moses for his abandonment of the children of Israel during their four centuries of enslavement” (p. 98). Indeed, Moses makes many demands of God—signs, wonders, and assurances—before he agrees to serve as God’s mouthpiece. This bargaining parallels Abraham’s intercession on behalf of Sodom and Gomorrah—in both, claims of pious modesty cloak a rare boldness in purporting to challenge God’s expressed will (p. 101). And it is predicated on the fact that, for many Israelites, the God of their ancestors was nothing but a myth—there was no reason for them to believe he had done anything but abandon them to suffer (p. 102).

The defining element of Moses’s relationship with God is that no man, up until that point, had been as forward, yet selfless, in making demands of God. Moses is unafraid to stand up for the Israelites, even before God and even when Israelites are worthy of some punishment. The climax of the narrative is Moses’s defense of the Israelite people in the wake of their erection of the Golden Calf. God was enraged at this display of idolatry and vowed to destroy the Israelites outright. This facially parallels the threat to destroy Sodom and Gomorrah but, unlike that case, God did not invite Moses’s counsel, and he certainly did not “stand before” Moses.¹⁶ Much the opposite, God ordered Moses to “leave Me be, that my wrath may flare against them, and I will put an

16. See *supra* note 12 and *infra* notes 122–23 and accompanying text.

end to them” (p. 107, quoting Exodus 32:10). But Moses did not depart, and he did not back down. He courageously took up the mantle of his people and urged God to “repent of this evil against Thy people.”¹⁷ Abraham was able to briefly challenge God, but only upon implicit invitation, wrapped in pieties. Moses, by contrast, speaks plainly and directly to God to convince him not to slay the Hebrew people. In part, his argument is reputational—if God slays the Israelites the Egyptians will draw the wrong message from their departure—but in part Moses is recalling God’s own prior ambivalence and unreliability as a protector of the Jewish people. God simply has not demonstrated the moral credibility to be able to slay the Israelites outright and yet command their obedience in the future (p. 108). And God responded in precisely the terms Moses demanded—he “repented of the evil which He thought to do unto His people.”¹⁸

After God’s repentance, Moses comes down harshly on the Israelites, destroying their false idols, berating Aaron for his role in the blasphemy, and having three thousand men killed. Upon returning to God’s presence, however, Moses threw his lot in with the Israelites. While even at the peak of his anger God had promised to spare Moses (who, of course, was not involved in the idolatry), Moses pleaded with God that if he were to slay the Israelites, to “blot me out” as well alongside them (p. 109, quoting Exodus 32:32). Though Moses is willing to castigate the Israelites for their failings, he is not willing to abandon them; in response to the possibility that God would obliterate them outright, Moses offered himself up as a human shield. It was after this that God finally was willing to speak to Moses as he had to none of his other subjects: “face to face, as a man speaketh unto his friend.” (p. 111, quoting Exodus 33:11). From then on, Moses was able to serve as God’s conscience, and God was willing to listen—not from any coercion that Moses could have made, but from God’s own internal compulsion to maintain a relationship, at least with Moses and perhaps with the Israelites or humankind as a whole (p. 114).

As before, however, the relationship could not last. Burt concludes his treatment of Moses by highlighting Moses’s ever-greater estrangement from God. Like Abraham, who at first “stood before the Lord” but eventually faltered and grew silent, Moses too was able to act as God’s conscience briefly, but eventually this harmony fractured. Moses grew more resentful over his role as a bearer of bad news for the Israelites (p. 125), and by the time God officially informed Moses that

17. *Exodus* 32:12.

18. *Exodus* 32:14.

he would not enter the Promised Land, Moses greets the news without any acknowledgment whatsoever (p. 129). In the end, Moses was relegated to conveying God's threats of punishment against the Israelites in evermore graphic detail, a task Moses felt well-equipped to do as it doubled as an indictment by Moses against God (p. 148). While Moses had previously been able to make appeals to God based on God's own image as merciful and forgiving, Moses eventually lost confidence in this vision and instead blandly held forth a divinity who ruled by fear and terror.

3. Job

Job, according to Burt, represents an alternate history of Moses. Like Moses, Job enters the story as a righteous man, and is selected for his unique role on the basis of that righteousness. Like Moses, Job appeals to God's conscience in the face of perceived injustice, and, like Moses, he initially is confident that God will behave in a just manner. Unlike Moses or any other character in the Hebrew Bible, Job does not relent, even in the face of extreme abusive escalation by God. And unlike Moses, Job eventually earns reconciliation and healing—a restored relationship with God.

Job is introduced as a man “perfect and upright, and one that feared God, and eschewed evil,” a characterization endorsed by God himself.¹⁹ Satan challenges God, saying Job's piety is only a product of his good fortune, so God authorizes an ever-increasing series of afflictions upon Job as a test, progressively stripping away his riches, health, and even his children. While Job initially endures, rejecting his wife's advice to “curse God and die,”²⁰ he eventually breaks. In the presence of three friends who came to comfort him, Job engages in a sustained lament and indictment of his unfair treatment by God (pp. 150–51). Despite his friends' insistence that God's actions (and thus Job's suffering) are just, Job does not relent. Unlike all of his predecessors, Job meets escalation with escalation, growing “increasingly adamant” in a way not even Moses ever dared express (p. 153). While Abraham was given implicit leave to critique God and Moses was brave enough to make his criticism uninvited, Job represents the first time that “God acceded to a specific demand for accountability” by a human actor (p. 155).

God's response was not what Job must have hoped for, at least at first. God remained silent in the face of increasingly bold challenges from Job, who seemed to hold himself out as God's judge and

19. *Job* 1:1, 1:8.

20. *Job* 2:9.

conscience (p. 155)—notably, the same role in which Moses had been previously cast. When God finally appears at the end of the Book of Job, he offers neither an apology nor an explanation for his conduct. Instead, he appears “out of the whirlwind” and berates Job for having the presumption to challenge him. God’s speech makes no mention of justice or righteousness—it is a pure display of unfiltered divine fury. God “parade[s] his vast power before Job,” asking Job rhetorically whether he was present at the creation of the world, whether he has explored its depths, and whether he can control natural forces (p. 158, citing Job 37–39). God’s reply to Job is the longest speech God gives in the Hebrew Bible, and yet nowhere does he respond to Job’s actual complaint (p. 158).

In the midst of this torrent, God demands that Job engage—“One who brings Shaddai to court should fight; he who charges a god should speak.”²¹ Job declines the invitation, however, protesting that he is small and will not respond to God.²² God reacts with even greater fury, citing to great mythological beasts that he could control (p. 159, citing Job 40:15, 40:24).

Why is God so enraged by Job? On the most superficial level, God is aroused by Job’s temerity. Normally, such defiance could be met with tangible punishment, but in Job’s case it was precisely this “punishment”²³ that had yielded Job’s protest in the first place. So God was reduced to a simple verbal display of fury. Yet as Burt points out, both Job and God seem to make reference to a prior state of affairs in which they had walked together in harmony. Job recalls this harmony in lamentation of its abandonment; this memory, in turn, provides perhaps the best explanation for why God bothers to answer Job at all (pp. 159–61). But God’s fundamental ambivalence and insecurity betrays him. Instead of coming back to Job in the spirit of reconciliation, he responds to Job’s indictment by upping the ante: “Who dares speak darkly words with no sense?” (p. 161, quoting Job 37:2).

When Job finally responds, he does so in the face of God’s full might and fury. Job’s final speech is ambiguous, turning on several vagaries in Hebrew language and grammar, which has allowed it to be interpreted in ways that comfortably reestablish God’s supremacy and Job’s defeat. Typically, Job is said to conclude by recanting. The

21. *Job* 40:2.

22. *Job* 40:4–5.

23. I have placed the word “punishment” in quotes because Job was not actually being punished—his innocence is stipulated at the start of the Book of Job.

Revised Standard Edition's formulation, "I despise myself, and repent in dust and ashes," is a conventional translation (p. 164). But the interpolation of "myself" is subjective; the verb *nacham* does not seem to have an explicit subject (Job, Job's condition, or God) (p. 163). Except arguably it does; specifically, "dust and ashes" may serve as a metonym for humanity (as was used by Abraham). The word *nacham* itself is also ambiguous, with meanings ranging from "comfort" to "abhor" to "shudder." And so a polar opposite translation is possible, with Job "shuddering for humankind [dust and ashes]," or even, most explosively, "repenting of repentance."²⁴ Burt chooses to accept that the passage is ambiguous, and he forwards a translation that preserves this ambiguity: "Therefore in dust and ashes, I withdraw." (pp. 163–65).²⁵

The Book of Job concludes with one final dramatic turnaround. After Job completes his final speech, God turns his wrath upon Job's friends, who had persistently and diligently defended God against Job's indictment. Why? Because they "have not spoken of me the thing that is right, as my servant Job has."²⁶ Even if one believes Job did finally recant, the only distinction between Job and his friends is that Job had publicly expressed an indictment of God, whereas his friends had fervently rejected it. That God finally adjudicates Job as the victor in this dispute is "as close to an open admission of guilt from God as we can find" (p. 167). And Job, for his part, is restored double his previous fortune—another indicator that God feels guilt and is seeking atonement, albeit indirectly.

B. *The Political Theory of the Bible*

In Burt's account, Western political theory is primarily about "perfect justice"—the idea that, given the right set of institutions and rules, we can achieve a state of affairs that is perfectly fair and just, resolving in perpetuity problems of scarcity and distribution (pp. 274–75). Because legitimacy flows from how closely government approximates this state of affairs, theorists assume the governors and governed start off as perfect strangers, in a state of nature where "social relations were constructed from nothing." By contrast, the Bible starts with "a memory of a broken relationship" (p. 39). The latter account presumes

24. See J. Jonathan Schraub, *For the Sin We Have Committed by Theological Rationalizations: Rescuing Job from Normative Religion*, 86 SOUNDINGS 431, 450–51 (2003) [hereinafter Schraub, *For the Sin*] (arguing that the dominant thread of translations "seriously distort the Hebrew" and offering a range of alternatives).

25. A decision this Review challenges below. See *infra* Part II.A.2.

26. *Job* 42:7–8.

that the sovereign and its subjects are in a preexisting relationship—indeed, can barely fathom “a moment when humans stand outside relationships” (p. 182)—but also presumes that this relationship is on unstable ground and may founder. Given this presumption, the Bible’s “core virtue in [its] political theory” is the “courage to transcend disappointment and mistrust and to renew and even deepen loving relationships” (p. 175).

If the Bible is a story about the relationship between humans and God, it is quite a stormy one. The pervasive theme of the Hebrew Bible is “an endless struggle by God to control humanity, and human beings in turn sometimes resisting this control but nonetheless endlessly trying to induce God to protect them” (p. 10). God learns quite early that he is unable to entirely control his creation—Adam and Eve’s decision to eat from the forbidden tree being one example—and Burt forwards the claim that the existence of the tree itself may have been uninvited by God and an example of primordial chaos reasserting itself (pp. 8–9). An authoritative ordering of the relationship between subject and sovereign—so essential to modern political theory (p. 182)—eludes God from the earliest moments.

Nor is this entirely a result of human fallibility. Sometimes the breach between God and humankind comes from human stubbornness, refusing to accede to God’s will. Other times, the failure stems from God “repudiat[ing] the previous conditions of an ordered relationship with us, his explicit promises to us” (p. 12). As Burt elucidates, both humans and God care about each other, but often act in ways that hurt the other. And yet they keep on returning, thus creating a cycle: “Over and over again, both God and humanity strive to re-enter [perfect harmony] But again and again, in the narrative accounts of the relationship between God and humanity, this unity is broken” (p. 15). Sometimes the fault lies on one side, sometimes the other. But sometimes the renewed effort emerges on one side, sometimes the other; but the cycle persists, and “this repetitive cycle of intimacy and withdrawal is the template for identifying the terms of the relationship between God and mankind” (p. 140).

The inability to create or preserve this sense of perfect harmony, “a puzzling failure, given the intensity of the wish on both sides to succeed” (p. 15), leads Burt to conclude that a belief in divine perfection is not at the Bible’s core. But if God is not able to promise perfect justice, what provides the impetus for humans to keep returning? One answer is simply God’s raw might—cowing humans into pleading

submission as in Hobbes's *Leviathan*.²⁷ Burt rejects this notion, however, in part because the Leviathan needs nothing from its subjects, it "stands outside and above political relationships; he wants nothing from his subjects but exercises absolute authority over them" (p. 277). God briefly gestures in this direction in Job, but eventually cannot sustain it—it is evident that God does not want a "relationship" with humankind predicated solely on overwhelming power. In the end, God would prefer to have a relationship with Job—bold, confrontational, uncompromising Job—than with his "frightened, pious Friends . . . realiz[ing] that honest interchange was the only way that he might obtain what he truly wanted from human beings" (p. 294).

As one would expect from a law professor forwarding a "political theory of the Bible," this sets up several observations Burt makes about constitutional law and Supreme Court practice. Using *Cooper v. Aaron*,²⁸ *United States v. Nixon*,²⁹ and *Roe v. Wade*³⁰ as his templates, Burt contrasts the judicial self-image as possessing infinite power and authority against the reality of a federal branch that is dependent on the assistance of others and popular acquiescence to make meaningful accomplishments (p. 303). In all these cases, Burt argues, the Court through thunderous rhetoric attempted to finally resolve questions of social justice that had sharply divided the nation. But the Court's insistence that its authority be respected betrayed a fundamental insecurity—the accurate worry that its authority was being challenged and mere assertions of its own infallibility would not be enough to guarantee a just result. The "command-and-punish" model is of limited utility for the Court as it is for God (p. 318).

Yet of course, the Court is not wholly impotent, and the God of the Bible is also clearly able to exert influence on the world. Here, Burt looks to how Eve was subjugated to Adam—not by Adam's superior strength, but based on her need for him. "God did not simply announce that man shall 'hold sway' over woman; instead, he said 'for your man shall be your longing, and he shall rule over you'" (p. 23, citing Genesis 3:16). Authority is legitimated by a condition of caring. It is not simply a matter of power, but rather an internalized belief of "longing" and of being concerned about one's partner, his or her opinions, and the perpetuation of the relationship. Humans obey God through the same

27. THOMAS HOBBS, *LEVIATHAN* (A.R. Walker ed., 1904). The title "Leviathan" itself is a reference to the monstrous creature God evokes in the Book of Job as proof of his ability to subdue even the mightiest beings. See *Job* 41:1–34.

28. 358 U.S. 1 (1958).

29. 418 U.S. 683 (1974).

30. 410 U.S. 113 (1973).

process—they do so because God and humankind exist in a relationship that is important and valued (pp. 23–26). Likewise, the Court finds its authority in its ability to remind the American people of our deepest values—a power that comes not from superior power, but from shared commitments to constitutional covenantal principles. It brings about racial equality not by battering segregationists into submission, but by illuminating how their actions are incompatible with conscientious commitment to our constitutional credo—a creed which even staunch defenders of Jim Crow valued and believed in (p. 318). When the Court tries to avoid this process and simply decree the appropriate result, it forgets “the proposition that voluntarily offered mutual respect [is] the only means by which the constitutional guarantee of equal justice could be made a living reality” (p. 323).

It may seem that obedience out of care is a thin reed upon which to rely compared to a fiat assumption that the sovereign’s will (expressed either through God or the Supreme Court) is just. But it makes up for that by enabling the possibility of a true relationship to emerge. God’s quest for absolute power fails precisely because it is carcinogenic to God’s desire for a meaningful relationship with humans—if “he was intent on maintaining absolute power over humans, he could do so only by having zero investment in obtaining any pleasure from them” (p. 31). Sometimes God attempts to straddle the line, for example, by asserting the naturalness of the human/divine relationship, or by simply commanding human love outright (p. 122). This is an effort doomed to fail—a coerced relationship is no relationship at all. But it also “betrays some doubt about the solidity” of the authority itself—it is evidence that God is worried, if not frightened, at the possibility of human abandonment and is working to prevent it (p. 30). As the Bible progresses, God develops as a character and more deeply explores his desire for human companionship (pp. 104–05). By the time we reach Moses, God has found a human to whom he could speak “as a man speaks to his fellow” (p. 106, quoting Exodus 33:11).

It is because the Bible does not adopt the starting point of strangeness, but rather of closeness, that its inability to fashion an authoritative order can be overcome. What makes the Bible unique is that it is not, and in fact cannot be, “expressed as disembodied propositions addressed to a generalized, anonymous audience. Its conception can be depicted only in intensely engaged interactions between God and humanity” (pp. 282–83).³¹

31. Burt uses Elihu’s attempted intercession in the Book of Job as an example of the irrelevance of a disinterested arbiter who is not enmeshed in the relational web (p. 282). Elihu is

The heart of Burt's Bible narrative is that both God and humans make promises in the Bible, and both at times fail to live up to them. Yet despite the "breach of contract," the covenant persists.³² In relation to the covenant, both sides make demands, and sometimes these demands are heard. In particular, consider the form of human challenges to God, which are expressed as demands for God to behave justly. The premise is that God is *capable* of behaving unjustly but should not, and the human obligation is to *compel* (or persuade) God into choosing a more merciful or ethical course of conduct.³³ Sometimes these efforts succeed and sometimes they do not; just as sometimes God's efforts to turn humans towards more ethical conduct are heeded and sometimes they are ignored. This perpetual failing would seem to be toxic in the modern tradition, which anticipates that the right set of rational propositions can eventually solve the puzzle of just distributions. But the Bible is able to account for the "inevitable cycle of the pursuit and unattainability of perfect justice" (p. 185) because there is more holding together the relationship than simply the dry expectation of perfection.

The relationship between God and humankind is quite evidently not characterized by perfect justice, but is instead permeated by continual failings. And of course, we have experienced this same sense of failure on questions of constitutional justice throughout our nation's history. The relationship between Americans and the Constitution, like that of God and humanity, persists not because it has been theoretically legitimated—God having the "right" to command obedience from human subjects, the Constitution having the "right" to loyalty from "We the people"—but rather because of a conscious and continuing choice that this relationship remains meaningful and that each feels the need for the other. The lack of a permanent resolution might cause perfect strangers to give up the enterprise, but neither the Bible nor the American Republic are conversations between strangers. What Burt calls "the warring parties" "cannot easily walk away because of the need each has for the other" (p. 283).

unrelated to the any other character in the Book, appearing suddenly without any previous mention to decry the perceived misdeeds of both Job and his friends (p. 282). This oration comprises all of chapters 32 through 37, and is entirely ignored by all the other participants—Job, Job's friends, and God (p. 282). Elihu is never mentioned again (p. 282).

32. See Adler, *supra* note 8, at 196 (noting that the covenant "endures as an attachment and a commitment even when reciprocal contractual obligations have not been fulfilled").

33. See Schraub, *For the Sin*, *supra* note 24, at 448 (arguing that Job presents God as the source of both good and evil, warring within himself between these two inclinations in his schizophrenic treatment of Job).

II. PROTEST THEOLOGY

Burt's argument is almost exclusively textualist, only occasionally citing secondary source literature and almost never citing the Talmud or other Orthodox canons of Biblical interpretation. For a project that explicitly casts itself as an exercise in Jewish heritage, this is an interesting choice. Traditionally, the Talmud, or oral law, has equal weight to the Biblical text and is considered to be of equally divine provenance.³⁴ Burt's sharply textualist focus is somewhat reminiscent of Karaite Judaism (which rejects the authority of the Talmud), even though in the modern era, Jewish religious thought relies heavily on Talmudic reasoning predicated on what might be considered a "religious common-law" method.³⁵

As it happens, though, Burt's argument justly lays claim to a vibrant element of Jewish theological tradition—that of "protest theology."³⁶ Protest theology represents those elements of Jewish tradition where humankind argues against divine wrongdoing. When Abraham "stood yet before the Lord" to argue for the fate of Sodom and Gomorrah's innocents, that was protest.³⁷ When Job persisted in declaring his righteousness and demanded that God account for his suffering, that was protest.³⁸ The very name "Israel" translates to "one who wrestles with God." It was given to Jacob because he had "striven with God and with men, and . . . prevailed."³⁹ This Part provides an overview of that tradition and how it relates to the similar claims that Burt forwards.

34. See Edward H. Rabin, *The Evolution & Impact of Jewish Law: Foreword*, 1 U.C. DAVIS J. INT'L L. & POL'Y 49, 53 (1995) ("The Oral Law (the commentaries that explain and supplement the Written Law) is considered to be divinely inspired, and thus equal in sanctity and dignity to the *Torah* itself.").

35. See *id.* at 55. Rabin explains,

Since a basic premise of Jewish law is that the *Torah* is the literal word of God, it might appear that its specific rules could not be changed by mortal beings. Yet these rules have been changed in response to pressing necessity, sometimes by interpretation and sometimes through legal fictions. The Rabbis of the Talmudic period, and later, derived authority for their power to interpret and supplement *Torah* law from a passage in the *Torah* itself that authorized the judges in the future to make decisions which the people should follow.

Id. (citing *Deuteronomy* 17:11). See also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 44 (2010) (discussing how Originalists read the Constitution not as a living Constitution, but an "unequivocal obligation . . . to follow [its] command").

36. I am not making the claim that protest theology is the dominant strain of Jewish thinking vis-à-vis God, only that it is a method of approach that is a legitimate and non-trivial part of contemporary and classic Jewish practice.

37. *Genesis* 18:22.

38. *Job* 27:2–6.

39. *Genesis* 32:28. The story itself is ambiguous as to whether the being Jacob wrestles with is God, an angel, or a man.

A. *The Abusing God*

David Blumenthal has perhaps most aggressively formulated the thesis that the God of the Hebrew Bible—sometimes—is an abuser.⁴⁰ As Blumenthal writes,

God is abusive, but not always. God, as portrayed in our holy sources and as experienced by humans throughout the ages, acts, from time to time, in a manner that is so unjust that it can only be characterized by the term “abusive.” In this mode, God allows the innocent to suffer greatly. In this mode, God “caused” the [H]olocaust, or allowed it to happen.⁴¹

This claim is not made lightly—Blumenthal “tremble[d] from head to toe to say it”—but Blumenthal relies on the sages’ teaching that “Truth is the seal of God.”⁴² In making this claim, neither Blumenthal nor I mean to suggest that God is always or primarily malevolent (nor, for that matter, that humankind is always perfect)—which is as false as asserting that God is always or primarily good. But there are enough homilies about God’s justice and mercy (and enough obvious examples of human fallibility) that I feel no need to retread well-worn ground. It is the claim that God—sometimes—acts in an abusive manner and—sometimes—must be challenged and held to account that is controversial.

Many of the most prominent examples outlined by Burt have been discussed previously in this Review. The *Akedah* is one such example; the entire Book of Job is another. But there are other instances that Burt does not address—most notably, the repeated refrain of God engaging in sexual abuse of Israel as punishment for Hebrew transgressions.⁴³ These are shocking, but they are present and they cannot be denied. In Bar Kappara’s famous words: “[W]ere it not written, it would be impossible to say so.”⁴⁴ In all of these cases, God is behaving as an abuser. His actions are unjust and humans have every right to protest against them.

1. *The Akedah*

The *Akedah* is the Hebrew name for the binding of Isaac, where God

40. See generally DAVID R. BLUMENTHAL, *FACING THE ABUSING GOD: A THEOLOGY OF PROTEST* (1993).

41. *Id.* at 247.

42. David R. Blumenthal, *Confronting the Character of God: Text and Praxis*, in *GOD IN THE FRAY: A TRIBUTE TO WALTER BRUEGGEMANN* 38, 47 (Tod Linafelt & Timothy K. Beal eds., 1998) (citation and internal quotation marks omitted).

43. See *infra* Part II.A.3.

44. David Winston, *The Book of Wisdom’s Theory of Cosmogony*, 11 *HIST. RELIGIONS* 185, 188 (1971) (quoting Bereshith Rabba 1:5)..

commands Abraham to sacrifice his son. It is implied that this command is a test of Abraham's devotion,⁴⁵ which appears to be confirmed at the climax, where, after Abraham had bound Isaac and was preparing to slaughter him, an angel stays his hand, saying "[F]or now I know that thou fearest God, seeing thou hast not withheld thy son, thine only son from me."⁴⁶

The loyalty test serves as the justificatory scheme for the *Akedah*. God is permitted to test the loyalty of his followers. Indeed, asking then-Abram to leave his house and move to Canaan could be interpreted as precisely that.⁴⁷ However, adopting this framework for reading the *Akedah* means obscuring another, more central point—Abraham is not being asked to perform just any loyalty test, he is being asked to sacrifice his son. He is being asked to murder his child. This is hardly extraneous information, and God certainly is not going to allow Abraham to forget it. The command is, "Take now thy son, thine only son Isaac, whom thou lovest, and get thee into the land of Moriah; and offer him there for a burnt offering upon one of the mountains which I will tell thee of."⁴⁸ Burt's narrative tellingly situates this request alongside Abraham believing that both his nephew Lot and first son Ishmael are dead by God's command, rendering this threat against Isaac more than credible.

The loyalty test is thus the wrong frame—or at least an incomplete one—through which to view the *Akedah*. We must also add in the touchstone admonition of post-Holocaust Jewish theology as articulated by Irving Greenberg: "No statement, theological or otherwise, should be made that would not be credible in the presence of the burning children."⁴⁹ Surely, if there is one statement that is incredible in the face of burning children, it is the moral propriety of commanding (even as a loyalty test) the slaughtering of children as a burnt offering.

Yeshayahu Leibowitz uses the *Akedah* to argue that "the essence of faith [is] man's ability to dissociate the consciousness of his standing before God from the problems of the individual, humanity, and the world."⁵⁰ Leibowitz's formulation effectively sees the *Akedah* as the

45. *Genesis* 22:1 ("And it came to pass after these things, that God did tempt Abraham . . .").

46. *Genesis* 22:12.

47. See *Genesis* 12:1.

48. *Genesis* 22:2.

49. Irving Greenberg, *Cloud of Smoke, Pillar of Fire*, in *AUSCHWITZ: BEGINNING OF A NEW ERA? REFLECTIONS ON THE HOLOCAUST* 305, 315 (Eva Fleischner ed., 1977).

50. Yeshayahu Leibowitz, *The Religious and Moral Significance of the Redemption of Israel*, in *CONTEMPORARY JEWISH THEOLOGY: A READER* 453, 461–62 (Elliot N. Dorff & Louis E. Newman eds., 1999).

apex of Abraham's relationship with God. In contrast to Lot, whose life (in tandem with the other residents of Sodom and Gomorrah) Abraham argued for at length, or even Ishmael, whose banishment troubled Abraham (though he fell silent at God's reproach), Abraham's silence throughout the *Akedah* represents the pinnacle of faith. But as Burt powerfully indicates, the Biblical text strongly seems to argue the reverse. Abraham's relationship with God grows more and more strained through each of these events, and the *Akedah* represents not ecstasy but rupture—the final nadir, the final breaking point. There is no closeness between Abraham and God after the *Akedah*. There is only silence—a deafening silence that may be the only response possible in the face of even the prospect of burning children.

2. Book of Job

The Book of Job is perhaps the essential text for any Jewish protest theology. The reason is that Job lays out the problem of divine evil in stark, almost purified, terms. Job is stipulated to be blameless at the beginning of the Book (so we can rule out justified punishment),⁵¹ and Job concludes, as Burt puts it, “as close to an open admission of guilt from God as we can find” (p. 167). In the middle, Job challenges God with relentless tenacity, escalating his rhetoric again and again until God finally responds with overpowering force.

Because of its explosive implications, the Book of Job is subject to (mis)translation that seeks to sap it of its heretical theme. Job is the patient sufferer who eventually finds redemption through capitulation, recognizing that God is divine and Job was presumptuous in thinking to question him.⁵² Downplaying verse after verse of Job's fiery indictment,⁵³ the focus instead turns to Job's final speech after God appears “out of a whirlwind.” Conventionally, Job backs down,

51. See *infra* Part II.C.3.

52. See H.L. Ginsberg, *Job the Patient and Job the Impatient*, in 17 SUPP. VETUS TESTAMENTUM 88, 111 (1968) (“[God] impresses upon [Job] that he cannot expect, with his puny mind, to understand [reality], and must not presume to ask for an explanation. And Job admits that he was wrong in this expectation and in this demand.”); Marvin Pope, *Job*, in 15 THE ANCHOR BIBLE LXXVI (2d ed. 1965) (“Given but a glimpse or a whisper of God's power and glory and loving care for his creation, Job realizes that he had spoken from ignorance and rashly. His resentment and rebellious attitude disappear.”).

53. Compare the Jewish Publications Society (JPS) and King James Version (KJV) translations of Job 13:15. The JPS quotes Job as saying “Though He slay me, yet will I trust in Him; but I will argue my ways before Him.” *Job* 13:15 (Jewish Publications Society). The KJV instead renders it as “Though he slay me, yet will I trust in him: but I will maintain mine own ways before him.” *Job* 13:15 (King James). See also Schraub, *For the Sin*, *supra* note 24, at 436 (accusing “the KJV and virtually every other standard biblical interpretation” as “turning courage and defiance into . . . sniveling submiss[ion]”).

recognizing his smallness in the face of God and recanting his prior denunciations.

As Burt alludes, this interpretation is, at best, questionable. It is not immediately clear in the Hebrew text whom Job despises (himself, God, or humankind), or indeed whether Job feels contempt, comfort, or fear. Burt leaves this passage ambiguous and does not resolve these seemingly essential questions. For him, it is unclear if Job ultimately remains steadfast or, like Abraham and Moses before, falters short. I, on the other hand, am of the opinion that Job does not falter, and suggest that this opinion is both more textually cohesive and better fits the Bible's narrative thrust as laid out by Burt.

Job speaks twice in response to God's theophany. After appearing "out of the whirlwind" at the start of chapter 38, God proceeds to verbally lambaste Job for seventy-one verses before demanding a response from Job.⁵⁴ One would think Job, who had previously been so adamant at demanding a hearing before God, would jump at the offer. But he demurs, responding "Lo, I am small, how can I answer You? My hand I lay on my mouth. I have spoken once, I will not reply; twice, but I will say no more."⁵⁵

Is this submission? It hardly seems so. In particular, the final sentence seems too cavalier, almost whimsical, given the gravity of the situation to be a sign of capitulation. Rather, this silence is another form of defiance. Job had not merely been demanding that God simply answer him, but rather was demanding a fair engagement on equal ground—asking that God "put aside His club. Let His terror not dismay me, then I would speak and not fear Him."⁵⁶ God did not just ignore this request; he actively spurned it. The totality of God's response was a thunderous rage meant to inspire nothing but terror and fear. Job said he would speak if God "put aside His club." God instead flaunted it, so Job did not speak.⁵⁷

That Job's response is defiant is buttressed by God's reaction to it—he does not take it as supplication, but instead flies into an even greater rage. As Burt notes, God treats Job's retort as if it "was itself a power

54. See *Job* 40:2 ("[H]e that reproveth God, let him answer it.").

55. *Job* 40:4–5.

56. *Job* 9:34–35. See also *Job* 13:20–21 ("Only do not two things unto me: then I will not hide myself from thee. Withdraw thine hand far from me: and let not thy dread make me afraid.").

57. See JACK MILES, *GOD: A BIOGRAPHY* 317 (1995) (describing Job's response as "defy[ing] the thunderer's demand that Job comment on his thunder"). See also Schraub, *For the Sin*, *supra* note 24, at 440–41 ("All Job asks is a fair playing field on which he can present his case and God can present His. When . . . it is apparent that this is not to be the case, Job has nothing more to say . . .").

play” (p. 159), and escalates his already impressive verbal assault with reference to even greater and terrifying beasts that God could subdue, but which would presumably crush and devour Job. It is in response to this tirade that Job delivers his second response.

It is here that Burt relies on the supposed ambiguity at the end of Job’s remarks to forward an equally ambiguous translation (pp. 162–63). Whether this one passage really is particularly ambiguous, though, elides the fact that there are many other indicators in the text as to Job’s meaning. Job’s refusal to engage was a commentary on God’s refusal to fight fairly, substituting overwhelming power for actual argumentation. In his second speech, he continues in this same light by also drawing attention to God’s exclusive emphasis on power over righteousness.

Job’s opening remark in his speech is typically rendered as, “I know you can do all things”—a submissive act by Job, conceding his relative smallness before the Lord. But this is *qere*—the true text reads as “*You know you can do all things*”—a bitingly sarcastic rejoinder by Job who is unimpressed by God’s powerful bluster which masks an inability to actually respond to Job’s demands.⁵⁸ Job’s response, in essence, is “big deal”—God already knows he can do all things, and Job has never denied it. To the extent that is the only “argument” God can muster, there is nothing left to respond to.⁵⁹ And if God, when backed into a corner, will simply blast his way out with his admittedly superior firepower, then we really should “shudder mortal clay”⁶⁰ and feel naught but contempt for God.

By contrast, to end Job’s fierce defiance with meek supplication is deeply unsatisfactory. Elie Wiesel found this prospect devastating—Job, the “fierce rebel, the fighter who dared to face God and speak up as a free man, abruptly bowed his head and gave in And so there was Job, our hero, our standard bearer, a broken, defeated man. On his knees, having surrendered unconditionally.” Wiesel was so troubled by Job’s apparent submission that he believed that the “true ending [of Job] was lost,” convinced that Job must have stayed upright until the end.⁶¹

The alleged recantation also doesn’t fit with the progression we witnessed from Abraham through Moses to Job. Abraham challenges God briefly, yet his courage falters as he grows evermore tentative in

58. See *infra* note 124 and accompanying text.

59. Schraub, *For the Sin*, *supra* note 24, at 441 (noting that phrasing the statement as “you know you can do all things . . . is a direct challenge to both the bullying nature of God’s response and to its irrelevance to the question of justice that Job has posed”).

60. MILES, *supra* note 57, at 428 n.324.

61. ELIE WIESEL, *MESSENGERS OF GOD* 231–33 (1976).

defending the innocents of Sodom and Gomorrah, ceasing before making the climactic argument (no innocents ought be slain alongside the guilty) (p. 72) and effectively retreating from the field. Moses is bolder still in standing up for the Israelites, but eventually his relationship with God frays and he too falls silent.

Job would seem to be the idealized state—the man who was able to maintain his integrity until the end in the face of divine injustice.⁶² In fact, the Talmud teaches that Moses may have *authored* the Book of Job,⁶³ indicating that Job is meant, perhaps, to be an idealized version of Moses—a Moses who was able in fiction to say what he could not (or could not consistently) when personally faced with the awesome power of God.⁶⁴ Reading Job’s final speech as another capitulation would sap his narrative of virtually all of its climactic force and would render him essentially no different from Moses—quite a bit of sound and fury for the sake of repetition. Moreover, it would obviate the meaning of the conclusion of Job. Not only does it render bizarre God’s subsequent admission of guilt (only after Job recants does God concede Job was correct), but it also obscures the fact that Job gains the reconciliation that eluded Moses. While Moses is excluded from the Promised Land, Job regains double what he has lost and lives happily to the end of his days.⁶⁵ Job had to have done something different from Moses to deserve this treatment—and it is that Job did not, in fact, back down from his function as God’s conscience.

3. Sexual Assault, Rape, and Mass Slaughter

Burt’s presentation of the “cycle” of the human-divine relationship is a mutual desire by both to achieve “perfect harmony” that is thwarted

62. See Job 27:5–6 (“God forbid that I should justify you; till I die I will not remove mine integrity from me. My righteousness I hold fast, and will not let it go; my heart shall not reproach me so long as I live.”).

63. BABYLONIAN TALMUD, BAB. BATHRA MISHNAH TRAC. 1:6 (Jacob Neusner ed., 2011).

64. One of the Talmudic Rabbis, Samuel bar Nahmani, declared, “Job never lived, but was merely a metaphor.” This, however, was a disputed opinion. *Id.*

65. See MILES, *supra* note 57, at 312 (“[W]hen the Lord promises double compensation, he implies that his own actions have gone too far. The Lord’s action here, if not explicit repentance, is unmistakable atonement and implicit repentance.”).

This also dispenses with still another argument, that while Job was indeed steadfast, Moses’s position of partial challenge but eventual retreat is actually superior. David Hartman describes his mentor Rabbi Joseph Soloveitchik’s position as being that

Jews have a right to think, to feel, and to love only to the degree that they are prepared to submit totally to whatever God will demand of them. . . . [These feelings can persist] only up to a certain point, beyond which one is required to accept unquestioningly the inexplicable demands of God and the authority of tradition.

DAVID HARTMAN, *A LIVING COVENANT* 88 (1985). Applying this standard would elevate Moses over Job—save again for the fact that Job gets the reconciliation that eludes Moses.

by mutual failings (p. 15). Rachel Adler notes, though, that there is a more sinister undertone to this metaphor given the rhetoric used to describe it throughout the Bible: A “covenant-marriage between God and Israel . . . in which an adulterous and abandoning wife is threatened and battered by an enraged and violent husband. What is even more troubling is that the texts justified the battering; they agreed that the battering was both appropriate and deserved.”⁶⁶ At several points throughout the Hebrew Bible, God engages in sexual abuse against Israel, usually as punishment for his people’s transgressions. These actions typically occur in the midst of prophetic rage, and thus are unmediated by the Biblical characters who share close relationships with God and could potentially intercede. Though there are several cases in the Bible in which God sexually abuses Israel, the following passage in Hosea stands out because it appears to cross over into the territory of rape: “Now I shall discover her lewdness in the sight of her lovers; *and none shall deliver her out of Mine hand.*”⁶⁷ In another section, God appears to imprison Israel and allow for her gang-rape by others.⁶⁸

Since these actions occur within the context of punishment, retribution is enlisted as the justification for God’s acts.⁶⁹ But the fact that Israel has transgressed (and is, in a sense, no longer “innocent”) does not mean that God’s actions are automatically justified. As Blumenthal argues, while in most abusive situations “[t]he victim usually has not wronged the perpetrator at all; . . . even if the victim has wronged the abuser, [it is abuse if] the abuser’s reaction is all out of proportion to the wrong committed.”⁷⁰ Indeed, it is God’s propensity for excessive punishment that is the subject of what the Talmud says is God’s own prayer: “May it be my will that my mercy overcome my anger.”⁷¹

Certain types of punishment are never justified, even if the target deserves punishment. Rape and sexual assault fall into this category. There is no context in which it is ethical to rape another human being. There is no theory of just punishment that would sanction such an act. Jews—even Jews who have sinned—have the right and obligation to protest against such brutalism because the punishment is, on its face, out

66. Adler, *supra* note 8, at 171.

67. *Hosea* 2:10 (emphasis added).

68. See *Ezekiel* 16:36–39.

69. See *infra* note 142 and accompanying text (discussing retribution as a justification for divine action).

70. BLUMENTHAL, *supra* note 40, at 248.

71. BABYLONIAN TALMUD, BERAKHOT 7A (Jacob Neusner ed., 2011).

of proportion to any crime that possibly could have been committed. Yet unlike Moses, who boldly stayed standing before God (in the face of an explicit dismissal) to plead his people's case when God threatened their annihilation,⁷² Hosea and Ezekiel do not enjoy (or, perhaps, have not attempted to forge) the same role that Moses had as God's conscience. The later Israelites had no true champion or advocate, and God was left to proceed unrestrained and unreminded of his obligations to his people.⁷³

There is particular danger here given Burt's articulation that obligations between humankind and God stem from a mutually caring, almost familial relationship (pp. 12–13). The gendered domestic violence in which God engages parallels domestic violence in the family unit, and in both cases there is a strong tendency to overlook or excuse behavior that generally would be an intolerable breach of public norms.⁷⁴ As many feminists have noted, the coding of the family unit as "private"—an effectively sacred relationship space, untouchable by the state's moral code—has served to legitimate abuse and violence within the family as morally untouchable.⁷⁵ To the extent Burt presents the whole Bible in this relationship-centric light, it is vulnerable to this same oversight; to the extent his "political theory of the Bible" recodes the entire relationship between citizens and the state in this light, we are all vulnerable to it.

Resisting this impulse means recognizing that abuse has been a part of this relationship from the beginning, and indeed has often

72. In response to the Israelites' worship of the Golden Calf, God threatened to wipe out the Israelites entirely and start anew. Genocide, like rape, falls in the category of inherently unjust punishment, and Moses responds accordingly. He does not plead for mercy but rather demands justice—God's plan would be an "evil" he ought repent for. See text surrounding note 16, *supra*. The sharp implication is that there are limits to the punishment that God can justly mete out.

73. But see Walter Brueggemann, *The Costly Loss of Lament*, 36 J. STUD. OLD TESTAMENT 57, 59–62 (1986) (arguing that the practice of lament also serves to put God on notice of potential injustice in a way that demands divine response).

74. See Adler, *supra* note 8, at 173 ("The centerpiece of the prophetic tradition is a metaphor for covenant as a partnership or intimacy between the parties. For progressives this metaphor evokes both the idealized bourgeois marriage and the partnership of citizens in the nation-state. What is decidedly under-emphasized in this account of prophetic literature is the violence threatened or chronicled in text after text." (footnote omitted)).

75. See, e.g., Catherine A. MacKinnon, *Reflections on Sex Equality under Law*, 100 YALE L.J. 1281, 1311 (1991) ("In gendered light, the law's privacy is a sphere of sanctified isolation, impunity, and unaccountability. It surrounds the individual in his habitat. It belongs to the individual with power. Women have been accorded neither individuality nor power. Privacy follows those with power wherever they go, like and as consent follows women. When the person with privacy is having his privacy, the person without power is tacitly imagined to be consenting.").

characterized it.⁷⁶ And yet many of us return, over and again. Why? Recognizing the fact of the abuse allows for “the most unbelievable of all possible responses to our woundedness, namely, grace.”⁷⁷ As this Review argues below, this is not an obligatory response. The abused are not obligated to return to their abusers; walking away is always a permissible choice.⁷⁸ But for relationships we value, we hope that forgiveness and reconciliation are possible.

B. *Standing Yet before the Lord*

It is a unique fact of the Jewish religion that we have a *covenant* with our God, and thus a basis for staking claims upon God.⁷⁹ The use of this particular device places God and humankind in a legalistic relationship with one another, capable of relying on legal argumentation as a means for justifying certain actions and condemning others.⁸⁰ For this reason, Judaism also holds a special, canonical place for the voice of “rebellion”—for the “cry of resistance [is] never completely stifled [Rather, the Jew] openly resists being shoved downward in the balancing between him and his God. . . . It is the unprecedented struggle in which the Jew asserts nothing less than his moral equality with his Father.”⁸¹

The existence of this covenant transforms God from an “absolute” to a “constitutional” monarch. “God has lost his freedom to be arbitrary, and man has gained the freedom of being able to challenge God”⁸² Through this observation, Jews developed what Rabbi Anson Laytner calls “the law-court pattern of prayer”—prayer expressed as an indictment by individuals (or the Israelites) against God.⁸³ This is a right enjoyed by the Israelites collectively and is not restricted merely to

76. See BLUMENTHAL, *supra* note 40, at 242 (“We must begin, under the seal of truth, by admitting that Scripture does indeed portray God as an abusing purpose; that God, as agent in our sacred texts, does indeed act abusively; that God, as described in the Bible, acts like an abusing male: husband, father, and lord.”).

77. Adler, *supra* note 8, at 190–91 (quoting RENITA J. WEEMS, *BATTERED LOVE: MARRIAGE, SEX, AND VIOLENCE IN THE HEBREW PROPHETS* 114 (2004)).

78. See *infra* notes 158–61 and accompanying text.

79. See Moshe Weinfeld, *Covenant*, in 5 *ENCYCLOPAEDIA JUDAICA* 1012, 1013–17 (1972).

80. See Elliot N. Dorff, *The Covenant: The Transcendent Thrust in Jewish Law*, in *CONTEMPORARY JEWISH ETHICS AND MORALITY: A READER* 59, 65 (Elliot N. Dorff & Louis E. Newman eds., 1995) (“God not only commands but enters into a legal relationship through the Covenant. Therefore, such legal techniques as interpretation, usage, and recourse to course of dealings became appropriate legal techniques to give meaning to the parties’ original relationship.”).

81. Harold M. Schulweis, *Suffering and Evil*, in *GREAT JEWISH IDEAS* 197, 198 (Abraham Ezra Millgram ed., 1964).

82. ERICH FROMM, *YOU SHALL BE AS GODS* 25 (1966).

83. ANSON LAYTNER, *ARGUING WITH GOD: A JEWISH TRADITION* xvii–xviii (1990).

individuals of heightened holiness like Moses.⁸⁴ Because this covenant obligates God “to conform to objective standards of justice,” it allows for either humankind or God to take on the role of complainant and file suit.⁸⁵

Recognizing—as Blumenthal does directly and as Burt does implicitly—that God can act abusively and thus can be subject to human challenge can lead to two opposing impulses. Burt focuses on forgiveness—the attempt to return to a prior condition of harmony and care that existed prior to the breach (pp. 64–65). Burt takes from the Bible that perfect justice is impossible, that there will be mistakes, and thus the critical question is how to recovenant, or restore, as best as possible, what had been lost and continue the pursuit of harmony (pp. 15–19). Blumenthal, for his part, focuses on vengeance—an uncompromising affirmation that God is wrong, we are right, and God’s abuse of humans is unjustified and can never be justified.⁸⁶ There can be no forgiveness for Blumenthal—only acceptance of God in all of his facets, good and bad, abuse and love.⁸⁷

Martha Minow titles her exploration of the human and social response to mass violence and genocide *Between Vengeance and Forgiveness*.⁸⁸ The difficulty in responding to mass abuse is that every punishment we can mete out feels inadequate, but leaving the crime unpunished feels intolerable.⁸⁹ We want retribution and reconciliation, and it feels as if both are out of reach and toxic to the other.

Between vengeance and forgiveness lies reconstruction. This does not “solve” the problem of vengeance and forgiveness—we may always be stuck in between the two in reflecting on our past. But protest

84. J. Jonathan Schraub, *Our Holy Grandfather*, 65 CONSERVATIVE JUDAISM (forthcoming 2013) [hereinafter Schraub, *Our Holy Grandfather*] (“[A] distinctive feature of the Jewish religion [is that] . . . [n]othing and no one stands between the individual Jew and his or her God. . . . God’s covenant with the Jews was not a covenant with a nation, or with a priestly class or with Moses or Aaron or any other designated leader, it was a covenant with individuals and families.”). In support he cites *Exodus* 24:7 (“Then [Moses] took the record of the covenant and read it aloud to the people. And they said, ‘All that the lord has spoken we will faithfully do!’”); *Joshua* 24:15, 22 (“But I and my household will serve the Lord But the people replied to Joshua, ‘No, we will serve the Lord!’”); and *Deuteronomy* 5:3–4 (“It was not with our fathers that the lord made this covenant, but with us, the living, every one of us who is here today. Face to face, the Lord spoke to you out of the fire.”).

85. Adler, *supra* note 8, at 181.

86. BLUMENTHAL, *supra* note 40, at 265–67.

87. *See id.* at 267 (“One cannot forgive an abusing f/Father. . . . We cannot forgive God and concentrate on God’s goodness. Rather, we will try to accept God—the bad along with the good—and we will speak our lament.”).

88. MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

89. *Id.* at 4 (quoting HANNAH ARENDT, *THE HUMAN CONDITION* 241 (1958)).

theology has a message for the future as well. Just as a lawsuit can enjoin future wrongs, protest theology, though not erasing or forgiving the wrong, can perhaps create conditions where they won't reoccur. The building blocks upon which the relationship is recreated are yet more strident demands for justice and fairness.⁹⁰

The theological theory outlined by both Burt and Blumenthal presupposes that, in spite of the vast asymmetry in power, the human prosecutor nonetheless has leverage over the divine. She has it because God desires a relationship with humankind from which humans can elect to withdraw.⁹¹ She has it because the raw power of the wrong may be strong enough to compel even God into a response (as in Job). She has it because God, in entering into a covenant, implicitly concedes that principles of justice have an effect on him—not an indomitable one, but an effect all the same. And so one response to abuse that lies between vengeance and forgiveness is to call upon God to cleave closer to his creed—to make real his promises so we might credibly say “never again.”

Abraham, arguing for Sodom, provides a template for these suits when he informs God, “Far be it from you” to slay the innocent alongside the wicked.⁹² He appeals to God with reference to God's own qualities: “Shall not the judge of all the earth do right?”⁹³ That Abraham is able to make such a statement “marks the fundamental change in the concept of God as a result of the covenant. . . . [Abraham] has a right to demand that God uphold his principle of justice.”⁹⁴ In contrast to his general passivity, here Abraham “is surprisingly audacious in the cause of justice, a stance that could scarcely have been predicted from the obedient and pious Abraham of the preceding episodes.”⁹⁵

Blumenthal postulates that God has an innate sense of fairness to which humans can appeal in pursuit of justice.⁹⁶ He declares this to be the first of “six personalist attributes of God.”⁹⁷ This sense of fairness

90. See *id.* at 22–23 (discussing the emphasis on building post-conflict institutions that can prevent similar atrocities from reoccurring).

91. See, e.g., Schraub, *For the Sin*, *supra* note 24, at 454 (“Job is pressing every advantage that *he has* over God. And it is wrong to suggest that Job has none. He has with him and behind him the entire weight of the covenantal relationship with God.”).

92. *Genesis* 18:25.

93. *Id.*

94. FROMM, *supra* note 82, at 28.

95. ROBERT ALTER, *THE FIVE BOOKS OF MOSES: A TRANSLATION WITH COMMENTARY* 89 n.23 (2004). It is also sharply distinct from Abraham's later behavior during the *Akedah*.

96. BLUMENTHAL, *supra* note 40, at 15.

97. *Id.* at 14–15. The six personalist attributes are as follows: (1) God must be fair; (2) God

is the terrain upon which humans can talk to God and challenge divine acts. In the words of David Frank, “Abraham, Moses, and Job assume that God is just, an assumption that God shares. This shared commitment to justice, or *Tsedek*, constitutes the shared ground of argument for God and God’s human interlocutors.”⁹⁸

This formulation—that God *must be* fair—is somewhat odd, as it conflicts with Blumenthal’s third attribute that God occasionally acts wrongfully, for he is “powerful but not perfect.”⁹⁹ I would rephrase this formulation to: God *can be appealed to* in the language of justice and fairness. That is, God can act unfairly, but this does not mean that fairness is not an integral element of God, any more than humans cease to have a conscience once we commit a wrongdoing. The language of justice exhibits a compulsion upon God—a resistible one, but a compulsion nonetheless. God does not always respond to human prayers (or indictments),¹⁰⁰ but presumably—following Burt’s powerful presentation of God in a relationship with humanity—He is not indifferent to them.

The important thread of this whole gambit, however, is that it is not a rejection of God. Whether or not one ultimately believes God will be responsive, the law-court model presumes two players in relationship with one another—it is a request for engagement, not a writ of divorce.¹⁰¹ The presumption is that although God is behaving in an evil manner, good still exists within God. Both good and evil come from the same source, and the latter does not expunge the former.¹⁰² Job’s demand for a vindicator is not a request for a “counter-deity” whose force can match God, but rather an appeal to those aspects of God which Job still believes recognize the fundamental righteousness of his plea.¹⁰³ It is because we still do care about God and our relationship with him that we argue so strenuously to God as a potential agent for vindication, even in the midst of his own victimization of us.

addresses, and can be addressed by, humankind; (3) God is powerful, but not perfect; (4) God is loving; (5) God gets angry; and (6) God is partisan. *See id.* at 14–20.

98. David Frank, *Arguing with God, Talmudic Discourse, and the Jewish Countermodel: Implications for the Study of Argumentation*, 41 ARGUMENTATION & ADVOC. 71, 75–76 (2004).

99. BLUMENTHAL, *supra* note 40, at 16.

100. *See* LAYTNER, *supra* note 83, at xviii (noting that only in “certain cases” does God render a “divine response to the petition”).

101. *See* BLUMENTHAL, *supra* note 40, at 284 (“Addressing the abusing God is not easy One must have a deep commitment to God, a deep desire to want to be with God, to want to have a relationship with God.”).

102. Schraub, *For the Sin*, *supra* note 24, at 448 (“The Book of Job is an unequivocal rejection of the Manichean or Gnostic belief that good and evil emanate from different sources. Rather, it is clear in Job that God is the primary source of both good and evil.”).

103. *Id.* at 453.

C. “Pleading God’s Cause”

God does not lack for defenders. All those who have challenged God have had to experience God’s apologists; those who, in Job’s biting words, “plead God’s cause.”¹⁰⁴ In his provocative play, *The Trial of God*, Elie Wiesel goes so far as to cast Satan in the role of God’s defense attorney.¹⁰⁵

Nonetheless, there can be no fair trial without a defense, and so it is incumbent to respond to some of the classic arguments put forth to explain away seeming injustices and wrongfulness done through God’s hand in the Hebrew Bible. This Section addresses three such defenses: (1) God lacks a persona or characteristics that can be judged; (2) We can historicize away offensive passages as simply the products of their time; and (3) God’s actions are “really” just (either as a matter of axiom or if “properly” interpreted). None of these give due accord to the textual record the Tanakh provides or the historical understanding of God and humankind’s relationship to him.

1. God Lacks a Persona (or at Least One Cognizable to Humans)

One response to any effort to judge God’s statements or actions in the Bible is to assert that they are merely metaphorical—substitutions for the inherent unknowability of God. Indeed, Maimonides held that any description of God must be metaphorical because God is so wholly other that He cannot be the subject of any attributes humans could possibly comprehend.¹⁰⁶ The problem with this argument is that it seems incompatible for two reasons: first, with the way religion is typically practiced; and second, as the more basic problem that it would seemingly preclude speaking about God in any way whatsoever.¹⁰⁷

The Bible, of course, speaks of God and God’s persona quite often,

104. When Job’s friends seek to dissuade him from his insistence of his innocent, Job demands of them:

Will you speak unjustly on God’s behalf?
 Will you speak deceitfully for Him?
 Will you be partial towards Him?
 Will you plead God’s cause?
 Will it go well when He examines you?
 Will you fool Him as one fools men?

Job 13:7–9.

105. ELIE WIESEL, *THE TRIAL OF GOD* 161 (2d ed. 1995).

106. See MAIMONIDES, *GUIDE TO THE PERPLEXED* 111–37 (Shlomo Pines trans., 1963). For example, Maimonides explains that “the Hebrew language uses the word *passage* in a figurative sense with reference to *voice*.” *Id.* at 50.

107. See SAADIA GAON, *THE BOOK OF BELIEFS AND OPINIONS* 94–102 (Samuel Rosenblatt trans., 1948).

and accordingly we are presented with a God who “walks and talks,” who “feels anger, despair, and joy,” and who “exercises moral judgment.”¹⁰⁸ God “enters into and is constrained by human time.”¹⁰⁹ Through these characteristics, the Jewish people are able to engage in the intimate relationship that is the hallmark of their faith.¹¹⁰ These attributes are what enable a meaningful relationship between humans and God; it is unclear how the Jewish people could relate to a divinity that was merely an unquantifiable abstract and not, at least partially, human.¹¹¹

The idea that God lies beyond direct human comprehension is also difficult to square with the Biblical text. An essential attribute of God’s biblical persona is that “God addresses, and can be addressed.”¹¹² God and humankind speak regularly in the Bible, and God modifies his actions in response to human intervention. Abraham’s famous intercession on behalf of the innocents of Sodom and Gomorrah is the classic example. Though God contemplated hiding his plans for the cities’ destruction from Abraham,¹¹³ he instead conferred with Abraham, who did not react with passivity and acquiescence. Instead (in what Burt notes is the first Biblical mention of “justice” and “righteousness” (p. 70)), Abraham “stood yet before the Lord” and pleaded for the lives of the innocent—bargaining God down by extracting promises to spare the city if there were fifty, forty-five, forty, thirty, twenty, and finally ten innocent persons residing in the cities.¹¹⁴ When God threatens to destroy the Israelites for erecting the Golden Calf, Moses intercedes and pleads with God to “repent of this evil against Thy people.”¹¹⁵ And, we are told, God listened: “HaShem repented of the evil which He said He would do unto His people.”¹¹⁶

Fundamentalist scholars who proclaim that God is unchanging justify this stance on the grounds that change implies imperfection—from better to worse or vice versa.¹¹⁷ But God *does* change. God changes

108. BLUMENTHAL, *supra* note 40, at 6.

109. Frank, *supra* note 98, at 74.

110. See SOLOMON SCHECHTER, ASPECTS OF RABBINIC THEOLOGY 47 (1993) (arguing that the “intimacy of relationship is reciprocal” between God and the Jews).

111. For example, Gordon Kaufman’s formulation that God is “creativity.” See generally GORDON D. KAUFMAN, IN THE BEGINNING . . . CREATIVITY (2004).

112. BLUMENTHAL, *supra* note 40, at 15.

113. *Genesis* 18:17 (“God said, ‘Shall I hide from Abraham what I am going to do?’”).

114. *Genesis* 18:24–32.

115. *Exodus* 32:12.

116. *Exodus* 32:14.

117. See, e.g., JAMES P. BOYCE, ABSTRACT OF SYSTEMATIC THEOLOGY 73 (2006) (“Perfection permits neither increase as though he lacks, nor decrease as though he can lose.

from being unbound by covenant to being bound by one. God changes his mind on numerous occasions when he threatens to wipe out the Israelites. God changes the standards by which he will judge Sodom and Gomorrah. God changes in response to human prayer. This, in a sense, is the cost of God engaging in the creative project at all—God creates humankind and thus has to account for other entities capable of speaking back to him.¹¹⁸

2. Offensive Passages are Anachronistic and Can be Abandoned

On the opposite side of the traditionalist argument, some argue for simply excising the offensive passages as products of their time, anachronistic, and thus not properly thought of as probative of God's true character.¹¹⁹ Under this view, we should not view the entirety of the Bible as literally accurate. Instead, the Biblical text should be selectively modified or downplayed to marginalize those sections that seem in tension with general pious norms which accord "proper" (which is to say, utterly deferential) respect to God.¹²⁰

To some extent, this argument is less "untraditional" than one would think, as demonstrated through the doctrine of *kethib/qere*. At various points in the Hebrew Bible, the written text (*kethib*) is marginalized (literally—it is moved to the margins of the page) in favor of an alternative iteration that is supposedly demanded by tradition (*qere*).¹²¹ One prominent example of this has already been mentioned above—while we are told "Abraham stood yet before the Lord" to plead for Sodom and Gomorrah,¹²² this is actually *qere*, displacing the *kethib*

Change must be for the worse or for the better, but God cannot become worse or better."); 1 CHARLES HODGE, SYSTEMATIC THEOLOGY 390 (1873) ("[God] can neither increase nor decrease. He is subject to no process of development, or of self-evolution. His knowledge and power can never be greater or less. He can never be wiser or holier, or more righteous or more merciful than He ever has been and ever must be.").

118. See Frank, *supra* note 98, at 75 ("The risk entailed in argument is a function of God's creation, a creation that does not provide God or humans with clear choices, sufficient information, or the clarity necessary to command immaculate perception."); MILES, *supra* note 57, at 12 (observing that God "enters time and is changed by experience," often being "unpleasantly surprised").

119. See, e.g., ROSEMARY RADFORD RUETHER, SEXISM AND GOD-TALK: TOWARD A FEMINIST THEOLOGY 19 (1983) ("[W]hatever diminishes or denies the full humanity of women must be presumed not to reflect the divine or an authentic relation to the divine . . .").

120. See, e.g., GRACIA FAY ELLWOOD, BATTER MY HEART 3 (1988) (claiming, as a Quaker, that "[b]ecause the final authority for Friends is not the written page but the Light within . . . it [is] comparatively easy to learn from the Bible's wealth without struggling with 'difficult' passages that affirm violence").

121. See ROBERT GORDIS, THE BIBLICAL TEXT IN THE MAKING: A STUDY OF THE KETHIB-QERE (1971).

122. *Genesis* 18:22.

wherein it is instead “God [who] remained standing before Abraham.”¹²³ The presumption that God might be in a supplicant’s position before Abraham was explosive, so while it was not erased, it was pushed aside in favor of a less contentious formulation. Likewise, in Job’s final speech, he is generally said to open by telling God “I know that you can do all things” (the Hebrew verb for “I know” would be *yadati*). But this is *qere*—the *kethib* is actually “You know you can do all things” (*yadata*). This minor modification changes the entire meaning of the sentence—from cowed submission to biting sarcasm.¹²⁴

While certainly much, if not all, of the Bible is not meant to be understood literally, there are two different directions one could go from this starting position. The first is to essentially ignore offensive passages entirely, or to suppress them to the greatest degree possible. However, this position essentially renders significant swaths of the text as a nullity, and that is incompatible with the belief that the whole of the Bible is holy and sacred.¹²⁵ Mere words can be historicized, but the Torah and Bible are not mere words. We are commanded, after all, to “teach them diligently to [our] children.”¹²⁶ As Judith Plaskow notes, the Bible “is not just history, however, but also living memory.”¹²⁷ Regardless of its literal truth or allegorical nature, each and every provision of the Bible carries with it meaning that demands an interpretative response.¹²⁸

The second position, then, is to accept story as story, but question what one should conclude from the words.¹²⁹ If, as Rabbi Abraham Joshua Heschel famously wrote, “[a]s a report about revelation the Bible itself is *a midrash*” (commentary),¹³⁰ what are we supposed to

123. See Schraub, *For the Sin*, *supra* note 24, at 459 n.30.

124. *Id.* at 441.

125. See BLUMENTHAL, *supra* note 40, at 243 (“This approach seems to me to be spiritually, as well as theologically and textually, unsophisticated precisely because it suppresses the ‘difficult’ side of human and divine being . . .”).

126. *Deuteronomy* 6:7. This commandment was rewritten and echoed by John Quincy Adams and later Warren Burger as the model for how Americans should treat the Constitution. See *infra* note 187 and accompanying text (explaining the connection Adams drew between the Torah and the Constitution).

127. Judith Plaskow, *Standing Again at Sinai*, in CONTEMPORARY JEWISH THEOLOGY: A READER, *supra* note 50, at 256.

128. See Adler, *supra* note 8, at 176 (“Explaining wife-beating metaphors as reflections of an earlier society’s customs provides a historical description of the text’s context but leaves the theological questions untouched: In what sense are such texts sacred texts? What is their authority, their normative power?”).

129. See BLUMENTHAL, *supra* note 40, at 238 (“I choose to engage seriously the texts as we have received them.”).

130. ABRAHAM JOSHUA HESCHEL, *GOD IN SEARCH OF MAN: A PHILOSOPHY OF JUDAISM* 185 (1955).

take from the divine text as it is given to us?¹³¹ What is the point of the “commentary” that, for example, God threatened to rape Israel or imprison her to be raped by others?¹³² We are supposed to draw *something* from it, and that something ought not be sugar-coated regardless of whether or not the events in question literally occurred.

Rabbi Gordon Tucker expounds on this theme in urging that the text ought to be seen as a springboard for interpretation and debate rather than a divine command. He draws upon the Biblical mandate that the “rebellious son” be turned over to be stoned,¹³³ and the subsequent Talmudic interpretation that “no one had ever been made subject to the . . . law . . . [and] no one ever would be.”¹³⁴ But if that were the case, “[w]hy was it in the Torah, then? Because the enterprise of expounding it would itself be rewarding.”¹³⁵ A belief in the Bible’s holiness can survive a belief that it is not entirely literal, that it is not entirely providential, even that it is not entirely just.¹³⁶ But it cannot survive the belief that it is not *relevant*.

3. God’s Actions Are Inherently Just

Finally, one could still argue that justice is inherent in the notion of divinity, hence, the particular events in question are not actually instances of injustice, but rather are appropriate, permissible, or otherwise tolerable. Moses exclaims in the Book of Deuteronomy: “The Rock! His work is perfect, for all His ways are just; A God of faithfulness and without injustice, Righteous and upright is He.”¹³⁷ Operating from this standpoint, Milton Himmelfarb held that a “just God is a dogma of Judaism and has been since before the days of Jeremiah.”¹³⁸ This notion fiats that God’s actions are just as an integral

131. Cf. DAVID HARTMAN, *A LIVING COVENANT: THE INNOVATIVE SPIRIT IN TRADITIONAL JUDAISM* 9 (1985) (“The tradition calls upon the community to renew the covenant in each generation. As the rabbis teach, one must live by the Torah as if the Torah had been given in one’s own time.”).

132. See *supra* Part II.A.3.

133. *Deuteronomy* 18:18–21.

134. GORDON TUCKER, *HALAKHIC AND METAHALAKHIC ARGUMENTS CONCERNING JUDAISM AND HOMOSEXUALITY* 7 (2006), available at <http://www.bjpa.org/Publications/downloadPublication.cfm?PublicationID=7838>.

135. *Id.* (Hebrew omitted).

136. See *id.* at 6 & nn.16–17 (citing Rabbi Abraham Joshua Heschel in support of the belief that the Bible may not be literal or literally written by God and yet is still holy).

137. *Deuteronomy* 32:4. See ABRAHAM COHEN, *EVERYMAN’S TALMUD* 16 (1975) (“[God’s] judgments are always just. With Him there is no unrighteousness, nor forgetfulness, nor respect of persons, nor taking of bribes.” (internal quotations omitted)).

138. Milton Himmelfarb, *Commentary on Homeland and Holocaust: Issues in the Jewish Religious Situation*, in *THE RELIGIOUS SITUATION: 1968*, at 64, 65 (Donald R. Cutler ed., 1968).

and unchallengeable part of Jewish tradition.

It is certainly true that a (at best) passive approach to divine injustice has been the dominant one throughout Jewish history.¹³⁹ Still, as a response to abuse, this is worrisome, for the instinct to deny this sort of filial abuse tracks for too many abuse victims a systematic societal denial of the wrong. The abusive passages of the Bible are already “revictimization” for the victims of abuse.¹⁴⁰ To compound this by repeating the denial so many of them have experienced displays a shocking lack of empathy and would seemingly convert the entire project of theology into a tool of evil. That is to say, each reading of the Holy Scriptures would ritualistically reenact the entire personal abusive story: the injury of the victim and her impotence as against an implacable society unmoved and unsympathetic to her sorrow.

Casting the net slightly more narrowly, most instances of divine abuse in the Bible are at least nominally preceded by human wrongdoing.¹⁴¹ Hence, they can be justified as righteous punishment.¹⁴² But this apologia is problematic. First, it clearly does not account for the Book of Job, where God himself stipulates that Job is blameless. Second, it is difficult to take seriously as a true exposition of moral philosophy—as Blumenthal strikingly puts it, “I cannot accept . . . that throwing one million children on burning pyres was justified Nor can I accept that years of physical and/or sexual abuse is punishment for the wrongdoing of any child.”¹⁴³ Blindly asserting that any and all punishment is a just response to sin does not sufficiently grapple with the structure by which humans in the Bible engage with God. Abraham and Moses do not simply make bare pleas for mercy in the face of wrongdoing. They utilize the language of justice, implying that it is not just a whimsical preference for mercy to which God is responsive, but a deeper moral commitment that might be violated by certain types of retributive acts.¹⁴⁴ This latter point—that certain types

139. See LAYTNER, *supra* note 83, at 115–16 (discussing the eventual preeminence of Rabbi Akiba’s holding that Jews must be submissive and patient in the face of divine adversity).

140. BLUMENTHAL, *supra* note 40, at 242.

141. Job is the notable and shocking exception.

142. See, e.g., LISA AIKEN, *WHY ME, GOD?: A JEWISH GUIDE FOR COPING WITH SUFFERING* 18 (1996) (“[God’s] system of justice is His way of showing interest and investment in us, not a way of getting even with us when we misbehave.”); DAVID KRAEMER, *RESPONSES TO SUFFERING IN CLASSICAL RABBINIC LITERATURE* 22 (1995) (“[I]f Israel appears to be punished before or more severely than other nations, this seeming injustice can easily be explained: others are not held accountable for the same transgressions as Israel and Judah. This shift in perspective allows us to understand Israel’s afflictions not as cruelty or harsh justice but as a loving, parentlike rebuke.”).

143. BLUMENTHAL, *supra* note 40, at 243.

144. See *id.* at 248 (noting that in abusive situations, “even if the victim has wronged the

of punishment are unjust even in the face of wrongdoing—has risen in prominence in the post-Holocaust era. Suffering may sometimes be a consequence of sin, but no sin could justify the imposition of the Holocaust.¹⁴⁵

To be sure, at times the Bible asserts that God is infinitely and unquestionably just. This is bluster, but it is unsustainable given the portrayal of God's character in the Bible. God informs us that "God is not a man, that He should lie; neither the son of man, that He should repent: when He hath said, will He not do it? Or when He hath spoken, will He not make it good?"¹⁴⁶ Yet earlier in the Tanakh, God is instructed to repent by Moses, and agrees.¹⁴⁷ It is true that at any given moment, God's response to critique may be to assert his own infallibility, relying on his untrammled power to bludgeon challengers into submission. So it was in Job where God came "out of the whirlwind"¹⁴⁸ to boast of his creation of the Leviathan¹⁴⁹ and his absolute dominance over all things.¹⁵⁰ The speech is one of pure power, dispensing entirely with argument or justification in favor of a litany of God's powers and capacities.¹⁵¹ But this is a sign of impotence, not omnipotence. God simply has no answer to Job's basic, and entirely justified, complaint.¹⁵² Paired with God's extreme abuse of Job over the preceding weeks, "[t]his is a frightening picture of a God who is at war with Himself and out of control God has painted Himself into a corner from which he bellows forth, a wounded potentate unable to ensure the predominance of His propensity for good (mercy) over His propensity for punishment (justice)"¹⁵³

It is only at the end that God returns from the brink and admits his mistake. God instructs Job's friends, rather than Job himself, to

abuser, the abuser's reaction is out of all proportion to the wrong committed").

145. See Eliezer Berkovits, *Faith after the Holocaust*, in CONTEMPORARY JEWISH THEOLOGY: A READER, *supra* note 50, at 355 ("Nor do we for a single moment entertain the thought that what happened to European Jewry in our generation was divine punishment for sins committed by them. It was injustice absolute, injustice countenanced by God.").

146. *Numbers* 23:19.

147. See *supra* notes 115–16 and accompanying text (quoting the Book of Exodus).

148. *Job* 40:6.

149. *Job* 40:25.

150. *Job* 41:3 ("Whatsoever is under the whole heaven is Mine.").

151. See MILES, *supra* note 57, at 314 ("Few speeches in all of literature can more properly be called overpowering than the Lord's speeches to Job from the whirlwind.").

152. See Frank, *supra* note 98, at 79 ("Job has not questioned God's power, claimed greater knowledge than God, or to have been present at creation. He asks for justice. In response, God proclaims God's might, but does not approach the question of justice God offers no explanation for Job's anguish, which appears to have no reason or redemptive purpose.").

153. Schraub, *For the Sin*, *supra* note 24, at 450.

repent—for they “have not spoken of Me the thing that is right, as My servant Job has.”¹⁵⁴ This is an interesting demand, for it was Job’s friends who “ple[d] God’s cause” in the face of Job’s relentless indictment.¹⁵⁵ And yet this command, repeated twice,¹⁵⁶ represents the last words God speaks to humankind in the Hebrew Bible.¹⁵⁷

D. Relationship after Rupture

To speak of divine evil in the sense that has been discussed in the preceding pages requires us to admit at least the possibility that the breach is irreparable. After the Holocaust, Emmanuel Levinas wrote a provocative and influential essay on the topic of “loving Torah more than God,” in which he advocated a turn away from “direct contact” with God as a ward against madness.¹⁵⁸ There are disturbing Biblical indicators of this potential as well. We have already noted that God’s capitulation to Job represents the last time God speaks to humankind in the Hebrew Bible;¹⁵⁹ this echoes the end of God and Abraham’s relationship, which was likewise silenced after the *Akedah*.¹⁶⁰ The Kotzker Rebbe deployed this possibility as a mixture of plea and threat in prayer:

Send us our Messiah, for we have no more strength to suffer. Show me a sign, O God. Otherwise I rebel against You. If you do not keep Your Covenant, then neither will I keep the promise, and it is all over: we are through being Your Chosen People, Your unique treasure.¹⁶¹

It is true that we all hope for this possibility of reconciliation, even after breach. As Adler puts it, “if all errors were fatal, we would be too paralyzed by despair to wish to assume responsibility or to desire integrity.”¹⁶² But this is an option, not a mandate—a voluntary decision

154. *Job* 42:7.

155. *See Job* 13:8.

156. *Job* 42:7–8.

157. Schraub, *For the Sin*, *supra* note 24, at 441 (“[I]t is far from coincidental that the Book of Job represents the last time in the Tanach that God ever addresses man.”). He adds: “[I]t is not Job who is silenced by God but God who is silenced by Job.” *Id.* With regards to the use of pure power as a substitute for reason and argumentation, it appears that God absorbed the lesson. One of the most famous Talmudic stories ends with God laughing that “my children have overcome me” after a majority of Rabbis overrule several direct divine interventions in favor of their consensus understanding regarding interpreting a particular purity law. BABYLONIAN TALMUD, BABA MESI’A 59B (Jacob Neusner, ed. 2011). The Rabbis pointed out that the “the Torah has already been given from Mount Sinai, so we do not pay attention to echoes.” *Id.*

158. EMMANUEL LEVINAS, *DIFFICULT FREEDOM: ESSAYS IN JUDAISM* 144 (Sean Hand trans., 1990).

159. *See supra* notes 153–57 and accompanying text.

160. Schraub, *For the Sin*, *supra* note 24, at 441.

161. LAYTNER, *supra* note 83, at 189.

162. Adler, *supra* note 8, at 188–89. Adler argues that if there is to be responsibility and

to renew the covenantal relationship and attempt to return to harmony, not “a moral norm that stands outside or above the wishes of the disputants themselves” (p. 300).

So why do we care? Why do we bother to even pursue renewal? Blumenthal answers simply: “[H]aving experienced that Presence, I cannot deny that it exists, nor can I deny that it engages me and that I engage it.”¹⁶³ What this boils down to is that we cannot necessarily control who or what we care about. Having had this relationship in the past, we can no longer simply elect to become pure strangers. It may be God who makes this the most clear, for God obviously does have the raw physical power to terminate any relationship with humankind whenever he desires. But what God cannot control is the feeling of need he possesses for human companionship. “His rage . . . however terrible, is, ultimately, helpless rage. . . . God is dependent on the other partner for what God wants, a desire that no amount of stripping or whipping can satisfy.”¹⁶⁴

Job appears to be in this same position. Job is clearly furious with God, and rightfully so. At one point, he even contemplates breaking off the relationship entirely: “Let me alone! My life is just a breath. What is man that You make so much of him . . . ? Why should You make me Your target . . . ?” (p. 289, quoting Job 7:17–21). Yet eventually this part of Job’s defiance crumbles. He does not want to turn away from the relationship; if anything, his language seeks to bring God closer (albeit in confrontation). He laments the loss of their prior closeness, but cannot forget its power. What may be Job’s most purely anguished cry comes in chapter 13, when he calls forth: “Why do you hide your face, and treat me like an enemy?”¹⁶⁵ What is striking here is what Job is *not* saying. Despite being subject to a torrent of divine abuse, Job is no longer calling on God to leave him alone. He does not follow his wife’s advice to “curse God and die.”¹⁶⁶ Much the opposite, he is calling on God to *come back to him*. In a literal sense, of course, God never left—as Job is all too painfully aware—but what Job is referring to is not literal proximity, but rather God returning back into the valued, meaningful, covenantal relationship. What seems to wound Job worst of all is not the physical scabs and boils, but the sense that he has been abandoned; that the special relationship he enjoys with God as a

accountability, “our only hope is in the possibility of *teshuvah*, return and reconciliation, the possibility that injuries can be healed.” *Id.* at 189.

163. BLUMENTHAL, *supra* note 40, at 238.

164. Adler, *supra* note 8, at 192.

165. *Job* 13:24.

166. *Job* 2:9.

member of the human species and thus as God's "partner in creation" has been shattered.

This feeling of abandonment—of being written out of a relationship and community of value—is sharp and real. The breach wounds not just because of the tangible harms, or even the expressive message it sends about our relative worth and value. It hurts us because it comes from a source we find important and meaningful. When the Conservative Rabbinat decreed that same-sex homosexual relationships were Halakhically impermissible, Rabbi Joel Roth conceded that this demand could legitimately leave its subjects "fill[ed] . . . with both anguish and anger."¹⁶⁷ If one did not care about Judaism or the Jewish community, it is unclear why this decision would be all that "anguishing," as opposed to just another annoyingly retrograde attitude by a backwards religious sect.¹⁶⁸ It is only for those who *do* consider the (Conservative) Jewish community to be theirs that this anguish manifests, for it places persons of homosexual orientation, in large part, outside of the Halakhic community that they still value and desire to be enveloped inside of—and one they fundamentally believe, in their experience, can envelope them.¹⁶⁹ To be rejected and cast out from that community leaves a brutal mark. While sometimes these ruptures are simply too great and cause the entire relationship to fracture, often we are not in control of what we care about, and find

167. Joel Roth, *Homosexuality*, in RESPONSA 1991-2000: THE COMMITTEE ON JEWISH LAW AND STANDARDS OF THE CONSERVATIVE MOVEMENT 643 (2000). In 2006, the Conservative movement voted on a series of new responsa, simultaneously reaffirming Rabbi Roth's opinion (approved by a 13-8-4 vote), JOEL ROTH, *HOMOSEXUALITY REVISITED* (2006), available at http://www.vbs.org/uploaded/Be_With_Us/Documents/Roth_Final.pdf, and largely overturning it by maintaining only the prohibition on male-male anal sex (approved by a 13-12 vote), ELLIOT N. DORFF, DANIEL S. NEVINS & AVRAM I. REISNER, *HOMOSEXUALITY, HUMAN DIGNITY, AND HALAKHA* (2006), available at <http://www.canonist.com/wpcontent/uploads/plugins/homosexualityhumandignityandhalakhah.pdf>.

Classical Judaism has no trouble validating two contradictory positions as both constituting valid and authoritative Biblical interpretations. This is most famously articulated as the "these and these" principle, affirming that the conflicting schools of Hillel and Shammai both "are the words of the Living God." BABYLONIAN TALMUD, ERUBIN 13B (Jacob Neusner ed., 2011). See also Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813, 836 (1993); Robert Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, in NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 239, 243 (1995) [hereinafter Cover, *Obligation*]. Because these majority opinions, though in opposition to one another, both represent theologically valid choices, either can be adopted by local Rabbis and congregations.

168. Tucker, *supra* note 134, at 21 ("They [(observant gay and lesbian Jews)] agree that halakhah has a valid moral claim to obedience by the community (which is why they care about what happens, for example, at the [Committee on Jewish Law and Standards].")

169. See *id.* at 18 (saying of Halakhically-committed gay Jews that they "yearn for the vision they have of a normalized life within halakhah to be shared more widely").

ourselves compelled to try to mend and repair what we feel we have lost.

It is precisely the possibility of angry reproach that provides at least the possibility of healing. Irving Greenberg argues that the ability to express this anger “is the first stage of a new relationship, perhaps the only kind of relationship possible with God at this point in history.”¹⁷⁰ Anger, after all, “is more compatible with love and involvement than pleasant niceties and old compliments.”¹⁷¹ As furious as God is at Job’s presumption, Job may well “have saved the Lord from himself.”¹⁷² Drawn into the fray of human pain and committing to holding himself accountable to human critique, God is transformed, and this transformation holds out the possibility of something that transcends the injustice of the past.¹⁷³

III. OUR DIVINE CONSTITUTION

The previous Parts’ arguments were primarily theological, forwarding a particular vision of God’s persona in the Hebrew Bible and its implications for how humans and God should interrelate. This Part presents another claim—that the American Constitution and the corpus of constitutional law occupy a similar space in the American psyche to God and religious law. The status of the Constitution has a similar “conventional” view attached to it—that it is righteous and just—and this “pious” outlook towards the Constitution channels how we understand its operation in American society in ways that have not yet been fully comprehended.

A. *Constitution as (Spiritual) Culture*

Our understanding of culture has evolved dramatically in the past several decades. While conventionally understood as a static “thing” that is relatively immobilized over time,¹⁷⁴ culture is now read to be

170. Greenberg, *supra* note 49, at 40.

171. *Id.* See LEVINAS, *supra* note 158, at 145 (“[E]thics and principles install a personal relationship worthy of the name. Loving the Torah even more than God means precisely having access to a personal God against Whom one may rebel—that is to say, for Whom one may die.”); Schraub, *Our Holy Grandfather*, *supra* note 84 (“The concept of approaching God means very little because what passes institutionally for approaching God has been stripped of all maturity and reduced to the repetitive, weekly incantation of familiar, ritual doxologies.”).

172. MILES, *supra* note 57, at 327.

173. See Samuel Balentine, “What are Human Beings that You Make So Much of Them?” *Divine Disclosure from the Whirlwind: “Look at Behemoth,”* in LINAFFELT & BEAL, *supra* note 42, at 259 (“The protest or lament forces both God and Israel to recalculate the possibilities and the requirements of the covenant relationship. It draws God into the fray of human pain and trouble, and as a result God must do or be something new.”).

174. See Madhavi Sunder, *Cultural Dissent*, 54 STAN. L. REV. 495, 511–12 (2001) (tracing

plural and contestable—“fluid, ‘webs of significance’ or ‘meanings’ that individuals create and share in order to make a home in, and indeed control, their world.”¹⁷⁵ In determining what these meanings are, “those with greater power in a community attempt to make their interpretations of a culture dominant while those with less power offer alternative visions of the culture’s meaning.”¹⁷⁶

Law, and constitutional law in particular, is a form of culture.¹⁷⁷ Culture is the process by which we create meaning and the result of its creation. The Constitution acts as a covenantal credo that defines our status as Americans—it “represents the lifeblood of the American nation, its supreme symbol and manifestation.”¹⁷⁸ The operation of law is not simply a question about what behavior society can extract from us on pain of sanction (though it is that). It is also more broadly constitutive of our worldview and personal commitments towards others.¹⁷⁹

In this way, the process of legal interpretation delineates the borders of membership in the community and what sundries flow from said membership. As Ronald Dworkin puts it, the act of legal interpretation seeks to “impose *meaning* on the institution . . . and then to restructure it in the light of that meaning.”¹⁸⁰ When those with power are the ones interpreting, this attempted imposition is backed by violence, and that background threat of violence helps enable the restructuring. We do not, as Robert Cover reminds us, “talk our prisoners into jail.”¹⁸¹ Yet still, we also do not venerate the Constitution solely out of fear. God commands terror and can unleash terror as a condition for obedience, but our relationship with God is not purely one of terror. The threat of

this outlook to nineteenth century anthropologist Edward B. Tylor).

175. *Id.* at 510.

176. *Id.* at 515.

177. See Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 167, 232 (1983) (arguing that law is “constructive of social realities rather than merely reflective of them”); Robert C. Post, *Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 54 (2003) (“[C]onstitutional law neither transparently expresses nor autonomously regulates constitutional culture. Instead it intervenes to shape the development of that culture on the basis of its understanding of that culture. In this way constitutional law simultaneously reflects and restrains popular values.”)

178. HANS KOHN, AMERICAN NATIONALISM: AN INTERPRETATIVE ESSAY 8 (1957).

179. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983) [hereinafter Cover, *Nomos*] (“Legal precepts and principles are not only demands made upon us by society, the people, the sovereign, or God. They are also signs by which each of us communicates with others.”).

180. RONALD DWORKIN, LAW’S EMPIRE 47 (1986).

181. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986) [hereinafter Cover, *Violence*].

violence exists and always exists in the shadow of our relationship with God and the Constitution, but does not exhaust it.

The observation that this cultural dynamic between Americans and our Constitution is something spiritual in nature is hardly novel.¹⁸² The Constitution, it has been argued, serves as an American “covenant”; to be American is to be a member of the “covenanting community” covered under the Constitution’s ambit.¹⁸³ As Sanford Levinson puts it, “the central sacred text of our civil religion” is the Constitution.¹⁸⁴ Thomas Grey identifies our requirement to pledge an oath to the Constitution as explicitly substituting for religious loyalty tests—instead of a national church, “the worship of the Constitution would serve the unifying function of a national civil religion.”¹⁸⁵ The Constitution provides us with various foundational “constitutional rights,” and the concept of “rights,” Cover argues, occupies a similar space in Western society as “Mitzvah” (commandment) does in Judaism—a highly evocative, even foundational, normative framework upon which our whole society rests.¹⁸⁶ Burt, too, places the Supreme Court as godly in its stature, by virtue of it having the effective final word on interpreting our national charter (p. 302). John Quincy Adams may have made the connection most evident when he substituted the Constitution for the Torah in the *V’ahavta*, a central Jewish prayer that follows the *Shema*: “Teach the [Constitution’s] principles, teach them to your children, speak of them when sitting in your home, speak of them when walking by the way, when lying down and when rising up, write them upon the doorplate of your home and upon your gates.”¹⁸⁷

The analogy of the Constitution to a religious tradition makes sense for several reasons. First, as Jack Balkin notes, speaking of the Constitution in religious terms allows us to “talk about the commitments of a people in a creedal tradition spanning many years . . . organized around the maintenance and interpretation of an ancient creedal text.”¹⁸⁸ In both cases, there is a community that organizes

182. See generally SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

183. See Whittle Johnson, *Little America—Big America*, 58 *YALE REV.* 1, 11 (1968) (“To be an American means to be a member of the ‘covenanting community’ in which the commitment to freedom under the law . . . itself takes on transcendent importance.”).

184. LEVINSON, *supra* note 182, at 121.

185. Thomas C. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 1, 18 (1984).

186. Cover, *Obligation*, *supra* note 167, at 239–40.

187. LEVINSON, *supra* note 182, at 12. The source Biblical text is Deuteronomy 6:7–9, from where Jews draw the commandment to place mezuzahs on their doorposts. See also *supra* note 126 and accompanying text.

188. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 7 (2011).

itself based on not just group affinity, but on identification with a common creed. Unlike our European forbearers, to be an American is not to (necessarily) be descended from a particular bloodline or tribe. Rather, Americanness presents itself in the conscious decision to cleave to the values and commitments put forward by the American Constitution.¹⁸⁹ In this understanding, the Constitution serves more as a covenant than a contract—it “endures as an attachment and a commitment even when reciprocal contractual obligations have not been fulfilled.”¹⁹⁰

Second, the religious metaphor links up the positive existence of laws (their ability to command the force of the sovereign) with the moral dimension that the Constitution seems to possess. The Constitution, and particularly the rights it puts forward, is not just a set of laws, or even just laws that are particularly hard to overturn. Instead, the Constitution represents a particularly important site of social cohesion, whose importance is not captured even by statutory protections that may accomplish the same thing. As Cover argues, statutory protections are dry and functionalist, carrying

very little in the way of rhetorical freight. They do not move us or provide slogans or organizing ideologies. The provisions exist because if we are to carry on certain functions we need them. They neither move nor dignify in themselves. If we want to leap forward providing a kind or degree of education heretofore unprovided, [for example,] we usually gravitate to the rhetoric of rights¹⁹¹

In this way, constitutional rights discourse represents a moral credo that goes beyond technical rules of governance.¹⁹² It is a rock and a shield, protecting us from evil and allowing us to fully exercise our values and capacities. Moreover, it serves as a wellspring of our collective ideals—it is a deep informant of what our values are and what

189. *See id.* at 2 (“The story of the Constitution of We the People is a constitution of We the People, bound not by blood but by a story, and by faith in a constitutional project.”). *See also* SAMUEL P. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 22–23 (1981) (arguing that while for most people national identity is forged through shared historical commonalities—ancestry, language, experience, and/or religion—the American identity is somewhat unique as an expression of shared political commitments). While he focused on the Declaration of Independence, Abraham Lincoln also stressed that our nation is linked not by a common ancestry, but by a common credo. *See* GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* 86–88 (1992).

190. Adler, *supra* note 8, at 196. *See also* WILLS, *supra* note 189, at 88 (“A nation born of an idea finds that idea life-giving.”).

191. Cover, *Obligation*, *supra* note 167, at 246.

192. Analogously, Maimonides held that the Torah is sacred precisely because it seeks out social transformation, and is not merely about technical rules of governance. MOSES MAIMONIDES, *THE GUIDE OF THE PERPLEXED* 378–85 (Shlomo Pines trans., 1963).

we imagine our capacities to be.¹⁹³

The problem I want to focus on, however, is that elevating the Constitution to this rarefied status risks investing it with the same sort of jurispathic power that similarly stunts our ability to interact with God—our imagination about what is just or fair is limited to that which is consistent with contemporary constitutional expression.¹⁹⁴ Of course, nobody actually thinks the Constitution is the equivalent of God. But “a pale version of the religious dilemma” remains.¹⁹⁵ A situation in which the Constitution can be credibly charged with immorality represents a crisis that strikes at the very heart of what it means for it to be “the Constitution.”¹⁹⁶ Because the Constitution is serving as our “higher law,” people “find it difficult to think about rights, or reform, or justice except in the ways that the Constitution-in-practice permits.”¹⁹⁷ For this reason, the project of forging a collective based on veneration of the Constitution took as its foundation the need to believe that “the Constitution can do no wrong.”¹⁹⁸

In this way, the religious metaphor helps illuminate some peculiarities in how we understand the meaning of constitutional pronouncements. If we are told something violates “divine law,” what exactly is meant? One answer is simply that the act in question will subject the actor to sanction from a sovereign entity capable of enforcing the proscription (whether in this life or the next). Whatever else God has, God possesses power, but power and perfection are not the same thing.¹⁹⁹ To speak of absolute divine power does not, in of itself, make any claims as to whether the proscribed act “actually” is morally right or wrong. It is merely a descriptive assertion that God disapproves of a particular activity, and a warning that the wise man or woman will refrain from engaging in it, lest he or she incur divine wrath. But of course, the conventional understanding of calling

193. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 109 (1984) (“[Law] is omnipresent in the very marrow of society—that lawmaking and law-interpreting institutions have been among the primary sources of the pictures of order and disorder, virtue and vice, reasonableness and craziness, Realism and visionary naiveté and of some of the most commonplace aspects of social reality that ordinary people carry around with them and use in ordering their lives.”).

194. BALKIN, *supra* note 188, at 11 (“A constitution like America’s also serves as a kind of higher law—it states ideals of liberty, equality, and democracy that people seek to live up to over time. The danger is that people will confuse what is just with what is constitutional.”).

195. LEVINSON, *supra* note 182, at 60.

196. See Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 754 (1982).

197. BALKIN, *supra* note 188, at 11.

198. See generally Gerard N. Magliocca, *The Constitution Can Do No Wrong*, 2012 U. ILL. L. REV. 723.

199. BLUMENTHAL, *supra* note 40, at 16.

something “unbiblical” or a violation of religious or divine mandate is more expansive—it also entails a moral judgment of the underlying conduct.²⁰⁰ To say something is morally proper but forbidden by God, or morally wrong but demanded by God, is nonsensical—at least in the conventional sense.²⁰¹

Compare this to the conventional understanding of labeling something “unconstitutional.”²⁰² Again, it could simply be descriptive—the act in question, which may be morally abhorrent or may be the most important moral obligation of our time, is beyond the sovereign’s sphere of authority. And again, this flies in the face of how most people view the Constitution.²⁰³ To call something “unconstitutional” is to do more than make a technical pronouncement about the scope of governmental authority. It is to issue a profound moral indictment as well—it is a normatively bad thing to promote a law that does not adhere to the principle of “equal protection,” or “due process,” or “freedom of the press.” Americans should not do things that violate the Constitution. We should not flout the Constitution’s will.²⁰⁴

This is not to say the existence of evil is incompatible with either a belief in a just God or a belief in a just constitution. It is well accepted that the Constitution sometimes permits wrong, even gravely wrong, governmental and social behavior.²⁰⁵ Similarly, any serious grappling with the problem of theodicy generally concludes that a just God nonetheless can permit humans, in exercise of their free will, to engage in evil. Sometimes, God withdraws from the fray, and humans are free to engage in a full range of ethical and unethical behavior. Often times,

200. There may be a link here to the research surrounding the “just world” theorem, which indicates that people are more likely to define actions or activities they cannot effectively challenge as being just or fair. See Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 419–20 (2006) (citing Melvin J. Lerner & Carolyn H. Simmons, *The Observer’s Reaction to the “Innocent Victim”: Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966)).

201. The protest theology model articulated above is an attempt to resist that axiom.

202. See LEVINSON, *supra* note 182, at 60 (“Not even the most ardent constitutionalist genuinely views the Constitution as the equal of God, but a pale version of the religious dilemma is nonetheless present.”).

203. See Grey, *supra* note 185, at 3 (“Americans have never regarded the United States Constitution simply as a hierarchically superior statute Rather, it has been, virtually from the moment of its ratification, a sacred symbol, the most potent emblem (along with the flag) of the nation itself.”).

204. See BALKIN, *supra* note 188, at 129 (“There is enormous pressure to believe that the system ordained and established by the document we pledge fidelity to is itself worthy of respect.”).

205. Gerard N. Magliocca forwards the free speech context as an area in which “lawyers take pride in protecting thoughts that they hate.” Magliocca, *supra* note 198, at 732 n.51.

the Constitution is in the same position, maintaining a studious neutrality on a given topic area, and thus enabling the American polity to freely decide amongst a variety of just and unjust choices. When they elect the latter, Balkin refers to the event as “constitutional tragedy”—“the possibility that the American people, working through the forms and practices of the Constitution, will produce great evils.”²⁰⁶

This is a standard response to the problem of theodicy, and it basically foists the problem onto humans. God gives humans space to act freely, and sometimes humans abuse the privilege. The Constitution gives us a republic; it is up to us whether we are able to keep it (and keep it just). We may or may not find the distinction persuasive—arguably, inaction in the face of wrong can be as culpable as affirmative action creating the wrong—but at the very least the form of the apologia is well-known.²⁰⁷

There is, however, another iteration of the problem—what Balkin calls “constitutional evil.” Here, the possibility is that the Constitution “as it operates in practice” may actively require great injustices.²⁰⁸ The paradigm case would be something like *Prigg v. Pennsylvania*²⁰⁹—the Constitution does not just permit, but affirmatively requires, state actors to participate in enforcing the slave regime. This cuts at the heart of the problem, because it deals not with constitutional silence or inaction, but with the affirmative requirements of our national charter. In the theological context, it is exceptionally difficult for us to comprehend the possibility that such mandatory injustices are a possible aspect of the Jewish God. Our view of the Constitution seems similarly constrained—all the love and veneration we feel towards the Constitution pushes against the possibility that it might require wrong. The risk is that our desire to see the Constitution as just will compel us to defend grave injustices, contorting our own moral compasses to maintain the omnibenevolent grace of our divine Constitution.²¹⁰

206. BALKIN, *supra* note 188, at 7. See also MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL (2006).

207. I’m skeptical of this argument, which has become harder for Jews to sustain in the wake of the Holocaust. The widespread claims that the Holocaust represented a potentially permanent covenantal breach indicate that in certain situations, divine passivity in the face of human suffering is as inexcusable as direct malevolent intervention. Therefore, my critique would include instances of constitutional silence (e.g., the non-inclusion of gays and lesbians as a protected class under equal protection analysis). This is a more ambitious claim, however, and one that is not immediately necessary to defend.

208. BALKIN, *supra* note 188, at 7.

209. 41 U.S. 539 (1842). For a compelling analysis of the moral dilemma faced by judges tasked with enforcing these gravely immoral laws, see generally ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

210. See BALKIN, *supra* note 188, at 127–29.

There is, in essence, a fundamental *mistake* in how we conceptualize our own attachment to the Constitution. We are taught to venerate the Constitution, believing that the Constitution is primarily a tool for justice, and that characteristic, we presume, is the source of our loyalty. So, we assume, that when the Constitution clashes with our intuitions of justice, either the interpretation of the Constitution is wrong, or we are.²¹¹ There is no occasion to have to “struggle against” the Constitution. But in reality, our attachment to the Constitution has little to do with any promise of “perfect justice”—this is a smokescreen.²¹² We value it for no other reason than because it is ours, and we are in a relationship with it. We do not approach the Constitution as a stranger. Thus, we are regularly faced with a situation where we must protest the Constitution—not a false vision of the Constitution, not a corruption of the Constitution, but the Constitution as it is presented to us, a credible claimant to the *legitimate* Constitution.

B. *Constitutional Exiles*

One of the great heroes of the American quest for racial equality was W.E.B. Du Bois. Born in 1868 in western Massachusetts, Du Bois attended Harvard University and became the first Black man to earn a doctorate from that institution. He quickly emerged as a powerful intellectual force within the Black community and the nation as a whole, helping found the Niagara Movement and later the NAACP.

Du Bois’s most prominent work, *The Souls of Black Folk*, came relatively early in his long career (published in 1903).²¹³ Though Du Bois was known for being more aggressive in the pursuit of full civil and political equality than the dominant Black leadership of the day (exemplified by Booker T. Washington), *Souls* had a conciliatory tone, accepting the good faith of Whites²¹⁴ and the temporary legitimacy of certain suffrage restrictions on poor, uneducated Blacks,²¹⁵ in the

211. See Magliocca, *supra* note 198, at 725.

212. Indeed, our veneration occurs despite the fact that most Americans know very little about the Constitution or what it protects. See NAT’L CONSTITUTION CTR., STARTLING LACK OF CONSTITUTIONAL KNOWLEDGE REVEALED IN NATIONAL CONSTITUTION CENTER SURVEY (Sept. 15, 1997). See also MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE 3 (1986) (“[T]he Constitution occupies an anomalous role in American cultural history [I]t has been swathed in pride yet obscured by indifference: a fulsome rhetoric of reverence more than offset by the reality of ignorance.”).

213. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* (Penguin Classics 1996) (1903).

214. See *id.* at 48 (“The present generation of Southerners are not responsible for the past, and they should not be blindly hated or blamed for it.”). See also *id.* at 144 (“[I]f the representatives of the best white Southern public opinion were the ruling and guiding powers in the South to-day the conditions indicated would be fairly well fulfilled.”)

215. See *id.* at 33 (calling such suffrage restrictions the decision “every sensible man, black

course of making a powerful argument for a vision of liberal democratic equality that included persons of all races. Twenty years of little progress later, Du Bois was far less sanguine when he wrote *Darkwater*.²¹⁶ Though still promoting a basic vision of democratic equality, Du Bois had no interest in presuming White magnanimity, and had transitioned into more of a cultural nationalist outlook.²¹⁷ He denied entirely that White America was even attempting to act in the best interests of Blacks²¹⁸ and held that White racism was the norm, not the exception, in the American Republic.²¹⁹ Yet again, this position failed him. After World War II, Du Bois began to find Communism increasingly attractive.²²⁰

This intellectual journey was not due to dilettantism. Rather, it was emblematic of a man who desperately was searching for a way to include Blacks in the full vision of the American people, only to find his hopes dashed again and again over the course of his long career. He dedicated his considerable intellectual firepower against the problem of White racism; from his vantage point, White racism proved impervious. And so it was that in 1961, at age ninety-three, Du Bois left America to reside in Ghana. He wrote, "I just cannot take any more of this country's treatment. We leave for Ghana October 5th and I set no date for return. . . . Chin up, and fight on, but realize that American Negroes can't win."²²¹ He died in Ghana in 1963, one day before Martin Luther King's "I Have a Dream" speech.

Du Bois's story is an American tragedy. Though not a lawyer, he was a person who believed in America's covenant even as America refused to include him in it. The vast majority of Du Bois's life was

and white" would have made in the wake of the Civil War).

216. W.E.B. DU BOIS, *DARKWATER: VOICES FROM WITHIN THE VEIL* (1920).

217. *Darkwater* was published one year after Du Bois spoke at the Second Pan-African Congress in Paris, where he applied the principle of national self-determination that was ascendant in Europe to persons of African descent. See Anthony Dawahare, *Langston Hughes's Radical Poetry and the "End of Race,"* 23 MELUS 21, 24 (1998) (describing how the 1920s gave Pan-Africanists a strategic opportunity to construct and "valorize" the Pan-African identity).

218. DU BOIS, *DARKWATER*, *supra* note 216, at 146 (attacking the presumption "that white people not only know better what Negroes need than Negroes themselves, *but that they are anxious to supply these needs*" (emphasis added)).

219. See *id.* at 39 ("This is not Europe gone mad; this is not aberration nor insanity; this is Europe; this seeming Terrible is the real soul of white culture.")

220. See W.E.B. DU BOIS: AN ENCYCLOPEDIA 197 (Gerald Horne & Mary Young eds., 2001) (quoting Du Bois as saying, "I believe in communism. I mean by communism a planned way of life in the production of wealth and work designed for building a state whose object is the highest welfare of its people and not merely the profit of a part.")

221. THE WORLD OF W.E.B. DU BOIS: A QUOTATION SOURCEBOOK 15 (Meyer Weinberg ed., 1992).

dedicated not to renouncing America, but rather seeking to hold America to its promises because for all of his country's shortcomings, it was still *his* country. It was a project he dedicated himself to heart and soul, even in the face of continual rejection by the very normative political order to which he was appealing back. Yet he persisted. Ten years before his final departure, Du Bois still could not contemplate the idea of abandoning America entirely, writing, "This is my native land. I shall never live elsewhere. I could not if I would. I would not if I could."²²²

Du Bois's Herculean efforts to reform America by any means imaginable is difficult to contemplate in terms of dominant political theory. To be sure, the attachment that Du Bois had to America is different in important ways from that held by members of the dominant groups.²²³ Still, if America was such a perpetual failure in its (un)equal treatment of Blacks, why did Du Bois feel any attachment at all?²²⁴ Cover tells us that "[d]eeds of violence are rarely suffered by the victim apart from a setting of domination" (either explicit or implicit).²²⁵ But he seems only half right. While Du Bois's inability to alter the constitutional narrative of racist exclusion was undoubtedly a result of the violent power possessed by the legal bodies (courts, judges, and executives) that maintained the system, Du Bois always had the opportunity to leave. Burt's account of the Bible's political theory, though, proves instructive: "The Bible differs from the dominant strand in modern political theory in presuming the prior existence of a relationship between ruler and ruled. Modern theory, for its part, is preoccupied with the initiation of a relationship" (p. 170). Like the relationship enjoyed between humankind and God in the Bible, we do not come to the Constitution *ex nihilo*—we come to it as an integral part of our political and social community. We possess, in a very real sense, a relationship with it. "Biblical theory thus directly confronts a problem that modern theory essentially ignores—how to resume the relationship after breach, always assuming that both ruler and ruled for their own reasons want a resumption" (pp. 170–71).

222. *Id.*

223. Compare BALKIN, *supra* note 188, at 109 ("[M]ost citizens have an emotional stake in the basic justice of our present constitutional institutions, even if they disagree about specific elements."), with Dorothy E. Roberts, *The Meaning of Blacks' Fidelity to the Constitution*, 65 *FORDHAM L. REV.* 1761, 1763 (1997) (describing Black fidelity to the Constitution as emerging from a recognition of their outsider status coupled with a demand that they be included, and a belief that one day they would be).

224. See Roberts, *supra* note 223, at 1762 (noting that, if anything, the Constitution should be the subject of cynicism and contempt amongst Blacks, not fidelity).

225. Cover, *Nomos*, *supra* note 179, at 1616.

Du Bois represents what I call a “constitutional exile.” An exile is a person who has been turned out or expelled by the community she identifies with and considers herself a part of. This is in contrast to an immigrant, who voluntarily decides to leave for another shore because she imagines she will have a better life there. The language of exile is meant to evoke not just the fact that there exists in any constitutional vision winners and losers. Rather, it hopefully gets at the sense of anguish and longing that the exile feels, stemming from a sense of rejection, even betrayal.²²⁶ A constitutional exile is someone who thinks of herself as encompassed within our constitutional covenant, but whose membership is rejected by the prevailing constitutional order—the constitution in practice.²²⁷ She rejects the choice that she either accepts her excluded status or leave,²²⁸ because she rejects the claim that the proper functioning of her communal nomos requires that her dissenting claim not be entertained.

The concept of constitutional exiles comes at the intersection of three related claims. The first is that the Constitution is an important (if not the most important) cultural setting with respect to identifying as an American.²²⁹ That is why constitutional contestation is so important even for people who, like Du Bois, are physically capable of exit. The second is that the Constitution is open to contestation—it does not admit a single orthodoxy, it is not “love it (as it is) or leave it.”²³⁰ That is how we can recognize the intelligibility of claims like Du Bois’s even though

226. Former Sixth Circuit Judge and civil rights icon Nathaniel Jones phrased post-*Brown* developments in school desegregation as a “betrayal.” Nathaniel R. Jones, *The Judicial Betrayal of Blacks—Again: The Supreme Court’s Destruction of the Hopes Raised by Brown v. Board of Education*, 32 *FORDHAM URB. L.J.* 101 (2004). It is an interesting choice of words, because it connotes a trust that was abused, and, as Dorothy Roberts points out, Blacks had no particular reason to trust the Constitution or the Supreme Court in the first place. Roberts, *supra* note 223, at 1762. Prior advances, though, allowed Black leaders like Judge Jones to have faith—it put them in the position of White Americans who always could indulge fully in the faith of the Divine Constitution.

227. See Sunder, *supra* note 174, at 508 (“Cultural dissenters are presumed to be either voluntary members of a culture *despite* the culture’s discriminatory norms, or free to exit the cultural group if equality is more important to them.” (footnote omitted)).

228. See Martha C. Nussbaum, *A Plea for Difficulty*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 105, 114 (Joshua Cohen et al. eds., 1999) (arguing that we should respect the decision of, for example, a woman to remain in a religious sect that prevents women from becoming priests as part of our general commitment to social pluralism); William N. Eskridge Jr., *A Jurisprudence of “Coming Out”: Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 *YALE L.J.* 2411, 2455 (1997) (affirming the permissibility of discrimination within social groups because of the right to exit).

229. See *supra* Part III.A.

230. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 29 (1973) (noting that an essential part of identifying culture as meanings is that these meanings are “essentially contestable”).

such claims may dissent (and dissent largely unsuccessfully) against the prevailing order. The third is that there is an inherent tension between the self-conception of the exile, who views herself as arguing from within the communal tradition, and her description by the dominant cultural players, who present her as a heretic willfully excluding herself from the “established” boundaries of the community.²³¹ That is why (and how) the exile is forced out in the first place—her claims pose danger to the contemporary (or preferred) ordering of the constitutional dynamic, one that invariably has its own promoters and defenders.²³² And the dominant view can eat away at the confidence of the exile—there is always the inclination to believe that the most fervent defenders of the dominant constitutional order possess a superior faith and fidelity than the doubters.²³³

Those who extol the virtues of popular constitutional change obviously know of the gap between holders of dominant and dissident constitutional norms. Their story is, after all, one that praises the ability of the formerly-fringe to achieve mainstream acceptance.²³⁴ But I fear that in all the exuberance that surrounds the capacity of the people to create real, lasting change in our constitutional reality, we miss something important regarding the perspective of the dissidents. When I read stories like Balkin’s, the imagery that comes to mind is fresh-faced volunteers singing songs as they mobilize and march off to war against injustice. Alternatively, one can imagine a sentiment of grim determination as a beleaguered minority commits themselves to a cause they do not truly expect to win, but upon which they are willing to martyr themselves—their commitment runs that deep.²³⁵ However the battle turns out, the combatants possess moral clarity, if nothing else.

But the terrain upon which this battle is fought creates a demoralizing unease, because the dissidents are not struggling against a strange entity

231. Gordon, *supra* note 193, at 109 (“[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live. ‘Either this world,’ legal actions are always implicitly asserting, ‘some slightly amended version of this world, or the Deluge.’”).

232. Cf. BALKIN, *supra* note 188, at 58 (discussing “strategic dis-identification” with reference to “the Hebrews who revolted against Moses’s leadership in the desert (and were slain as a result)”). That these Israelites are now considered to be part of an external “they” rather than “we” is fraught with meaning given the interpretation of Korach (the leader of this “revolt”) in the concluding section. See *infra* notes 297–308 and accompanying text.

233. See WIESEL, *supra* note 105, at 160–61 (exploring the consequences of the misguided belief that God’s defense attorney has a special connection to God that would allow him to intercede on behalf of the threatened Jews).

234. See BALKIN, *supra* note 188, at 97–98.

235. See Cover, *Violence*, *supra* note 181, at 1604–05.

they only know as evil. Rather, they are struggling against (what has a legitimate claim to be the authoritative construction of) an entity they themselves value—the Constitution. Even the “enemy Constitution” thus exerts normative force. Faith is not just the belief that we can change the Constitution to match our conception of justice; it is also a strong sense that the Constitution has something to teach us about justice. Alternative visions of justice spring up in response to constitutional shortcomings, but these visions are immediately threatened by constitutional veneration—a dissonance between competing sources of political commitments. There is always a sense that one is committing a form of “adultery” against an institution that one truly does think of as important.²³⁶ If the Constitution exhibited no pull on us but for its harmonious coexistence with our own conceptions of justice, we would feel no dissonance at all. But because our relationship with the Constitution exists independent of its capacity for perfect justice, even as it speaks to us in terms of covenantal ethics, we are left reeling. Consequently, it is difficult—not impossible, but difficult—to maintain an oppositional outlook for long stretches. Either one abandons the faith entirely, or one recants and accepts the orthodox picture.

This Review previously discussed the sense of “anguish” that comes from feeling written out of one’s own community and *nomos*, using the example of Halakhically-committed gay Jews.²³⁷ In the United States, the Constitution serves as a critical benchmark of the borders of this community—the entire idea of who “the people” are is mediated through a “constitutional structure” that delineates those individuals who enjoy the “rights and privileges of citizenship.”²³⁸ Consequently, there is an especially raw hurt that emerges when the dominant purveyor of constitutional meaning declares that what one takes to be an essential element of one’s equal standing in the polity is not, in fact, covered by the charter.²³⁹ If, as Balkin argues, the process of

236. See BALKIN, *supra* note 188, at 103 (“What judge, lawyer, or law professor wants to be thought of as unfaithful to the Constitution? Who wants to be known as a constitutional adulterer?”).

237. See *supra* notes 167–69 and accompanying text.

238. Melvin L. Rogers, *The People, Rhetoric, and Affect: On the Political Force of Du Bois’s The Souls of Black Folk*, 106 AM. POL. SCI. REV. 188, 188 (2012).

239. Though I am taking the Supreme Court to be generally understood as the dominant purveyor of constitutional meaning, it does not have to be. It may be that a broadly held popular conception of the Constitution holds more sway in the public imagination than an unpopular Supreme Court decision. See BALKIN, *supra* note 188, at 237. But this does not mean that there are not minorities who are left lacking an authoritative constitutional narrative to validate their claims; it just means they are on the outside looking in against a different source of authoritative interpretation.

“constitutional redemption” (whereby a constitution abolishes slavery, protects civil rights, and engages in other laudatory acts) allows “we the people” to claim credit for these triumphs,²⁴⁰ then the refusal of the Constitution to encompass a particular rights vision also is understood by its victims as a decision by “we the people” to pass those persons by.

Often times this harm may be blunted by the prospect of legislative reform.²⁴¹ Even if the Constitution does not provide protections to certain groups, the legislature is always available to ride to the rescue. Note the implicit belief that the Constitution never *requires* the wrong. But even where one is (capable of being) protected by democratic politics, there is a special feature of being a subject of constitutional protection—not just that it makes it harder to hurt you, but that it is seen as part of our constitutive charter that one cannot rightfully be hurt. Hence, the great sense of woundedness when one is written out of constitutional protections, and the great efforts expended to give life to these constitutional protections. This is why the wrong done by state court decisions legitimating the ban on gay marriage, for example, is not entirely rectified when they are reversed by statute.²⁴² There is a qualitative distinction between having protection simply because a potentially transient majority accedes to it, and having protection because the foundational charter of the community refuses to contemplate that you come to harm. This does not mean courts are properly tasked to “right every wrong, suture every societal wound, and correct every injustice.”²⁴³ But it does mean that we recognize the totality of what courts are, in fact, refraining from doing when they elect to withdraw from a given field.²⁴⁴

Burt’s presentation of the Constitution and Supreme Court as

240. *Id.* at 31.

241. *See, e.g.,* FCC v. Beach Commc’ns, Inc., 508 U.S. 307, 314 (1993) (“The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.” (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979))).

242. *See, e.g.,* Conaway v. Deane, 932 A.2d 571 (Md. 2007) (upholding Maryland’s ban on same-sex marriage), *abrogated by* 2012 Md. Laws 2, codified at MD. CODE ANN., FAM. LAW § 2-201 (repealing, effective 2013, the ban on same-sex marriage).

243. Gerald E. Rosen, *The Hard Part of Judging*, 34 SUFFOLK U. L. REV. 1, 9 (2000).

244. *See* BALKIN, *supra* note 188, at 135–37. This also serves as a counterweight to Burt’s preference that courts be circumspect in their efforts to fiat resolution to polarizing social controversies. Burt would prefer that the Court act as a “rainbow,” reminding Americans of our covenantal obligation so we have the opportunity to resolve the injustice ourselves (pp. 318–23). I am not necessarily opposed to that vision, but I do want to emphasize that even successful democratic action is not a complete substitute for vigorous constitutional protection, given the unique role our Constitution plays in our construction of moral responsibilities.

analogous to the previously established divine/mortal biblical dynamic does not directly tackle this problem. His paradigm case is *Cooper v. Aaron*,²⁴⁵ which was the first significant judicial response to the problem of “massive resistance” by the southern states to the Court’s landmark decision in *Brown v. Board of Education*²⁴⁶ (p. 304). The Court cast its opinion as a steadfast defense against the rebellious southern states waging “war against the Constitution.”²⁴⁷ God (played by the Court) has issued a definitive interpretation of the Torah (Constitution), against which the people (Governor Faubus) are rebelling. For Burt, *Cooper* is an appealing analogy to the failure of God’s “command-and-punish” authority (p. 303)—it represents the apex of the Court’s presentation of itself as infallible and unchallengeable, even as it was coming under unprecedented assault, which clearly elucidated the Court’s structural weaknesses in actually translating its demands into practice.²⁴⁸ Even after *Cooper*, the Court finds that it is unable to simply will racial equality into reality.²⁴⁹ Yet in the face of this intransigent resistance, the Court finds an alternative source of power—not infinite and unquestioned authority—but an ability to shine light on grievances hitherto ignored, reminding us of the gap between our promises and our practices (p. 314).²⁵⁰

But this narrative only deals with half of the question. From our modern vantage point, nobody has sympathy for the rebels in *Cooper*, and so we root for the insurrection to be crushed. The God-actor, the Supreme Court, is on the side of the angels, and while Burt’s account problematizes the God/Court’s *power*, it leaves untouched its *righteousness*. Although Burt rejects the claim that the Court possesses “exclusive interpretive authority,” this stance stems from his belief that the “putative wrongdoer [must be] brought to acknowledge the norm [of justice] and his violation of it” (p. 325). Burt characterizes this as a practical problem in bringing about the real world remediation of

245. 358 U.S. 1 (1958).

246. 347 U.S. 483 (1954).

247. *Cooper*, 358 U.S. at 18.

248. See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton) (“It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power”); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008) (examining the ability of the Court to effectuate liberal change).

249. See Cover, *Violence*, *supra* note 181, at 1612 (“[B]ridging the chasm between thought and action in the legal system is never simply a matter of will.”).

250. Like with *Cooper*, Burt has issues with the other two cases discussed in this section of his book, *United States v. Nixon*, 418 U.S. 683 (1974), and *Roe v. Wade*, 410 U.S. 113 (1973), but they are also with the process and rhetoric the Court uses, not a belief that the Court was actively instantiating an injustice.

injustice, with the underlying assumption—that what the Court and what the Constitution does is at root just—remaining untouched. But the Court does not always speak for justice. Sometimes the rebels have the better argument—and then the question becomes how to rectify the relationship when the “divine” organs of the state are being used to suppress rightful dissidents.

Consider instead the Court’s more recent decision in *Parents Involved in Community Schools v. Seattle School District #1*.²⁵¹ *Parents Involved* was, at its root, a dispute over the proper meaning of a canonical text in the corpus of American constitutional law—*Brown v. Board of Education*.²⁵² The critical question was whether *Brown*’s ideal was either integrated schools or color-blind student allocation schemes. For Chief Justice Roberts, it was the latter: “Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin.”²⁵³ Justice Thomas referred back to the arguments made by the attorneys in *Brown* to claim that the “color-blind Constitution . . . was the rallying cry for the lawyers who litigated *Brown*.”²⁵⁴ By contrast, Justice Breyer claimed the decision “threaten[ed] the promise of *Brown*,”²⁵⁵ and Justice Stevens sharply took issue with Chief Justice Roberts’s incomplete rendering of the historical record: “the history books do not tell stories of white children struggling to attend black schools.”²⁵⁶

Solely as a question of history, there is little doubt regarding the opinions of the *Brown* attorneys—Thurgood Marshall made clear his opposition to a rigid colorblind Constitution in his *Bakke* opinion,²⁵⁷ and the surviving attorneys from *Brown* reacted to the *Parents Involved* decision with undisguised dismay.²⁵⁸ As far as they were concerned, the proper understanding of the Fourteenth Amendment (and the one that had held sway in the courts in the first few decades after *Brown*) had been abandoned in favor of a viewpoint unrelentingly hostile to true

251. 551 U.S. 701 (2007).

252. 347 U.S. 483 (1954).

253. *Parents Involved*, 551 U.S. at 747 (plurality opinion).

254. *Id.* at 772 (Thomas, J., concurring).

255. *Id.* at 867–68 (Breyer, J., dissenting).

256. *Id.* at 799 (Stevens, J., dissenting).

257. *See* 438 U.S. 265, 387 (1978) (Marshall, J., concurring in the judgment in part and dissenting) (rejecting the claim that universities cannot use race in the course of remedying a history of racial discrimination).

258. *See* Adam Liptak, *The Same Words, but Differing Views*, N.Y. TIMES, June 29, 2007, <http://www.nytimes.com/2007/06/29/us/29assess.html> (collecting quotes from *Brown* attorneys calling the decision “preposterous,” “100 percent wrong,” and “stand[ing] [*Brown*’s] argument on its head”). Chief Roberts confidently stated in his opinion that “history will be heard,” *Parents Involved*, 551 U.S. at 746, and so it was—quickly.

racial equality.²⁵⁹ Even though *Parents Involved* was hardly an outlier in terms of contemporary judicial treatment of desegregation,²⁶⁰ the case went a step further because it blocked the voluntary, democratic effort by the community to achieve student integration (in a former slave state, no less!).²⁶¹ Even if that spark was isolated to only a few cities, snuffing it out “takes away some hope . . . [and] it is no small thing to dash hope.”²⁶²

But from the vantage point of the *Brown* attorneys, the even more damaging result of *Parents Involved* was its attempt to inscribe a vision of a sacred American value (“equal protection”) that was directly contrary to what they took to be the core principles of racial justice. If, as Cover puts it, courts respond to “luxuriant growth of a hundred legal traditions” by “assert[ing] that *this one* is law and destroy[ing] or try[ing] to destroy the rest,”²⁶³ the very vision of constitutional equality as it had been understood by the civil rights movement had just been placed directly in the Court’s crosshairs. Or worse, if the Constitution only bars evil, then the civil rights ambition was being recoded as the sort of behavior that one could not justly do to one’s fellows—a violation of “equal protection.” The law is one source that teaches us what our social duties are towards one another.²⁶⁴ Indeed, that is often the point of judicial opinions—they are designed to instill in the public a sense of our common creed and values as Americans.²⁶⁵ The panic

259. See 551 U.S. at 803 (Stevens, J., dissenting) (“The Court has changed significantly since it decided *School Comm. of Boston* in 1968. It was then more faithful to *Brown* and more respectful of our precedent than it is today. It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision.”). For a more thorough exploration of how the meaning of *Brown* drifted such that it became an obstacle, rather than an instrument, of its progenitors’ vision of racial equality, see David Schraub, *Sticky Slopes*, 101 CAL. L. REV. (forthcoming 2013) (manuscript at Part III.C).

260. See James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131, 142 (2007) (“[T]he reality is that the Court has not issued a significant, favorable opinion regarding school desegregation in about thirty years.”).

261. In a sense, it was democratic bodies “riding to the rescue” against court rulings dramatically circumscribing the conditions where school integration was constitutionally mandatory, and the Supreme Court heading them off at the pass. See *supra* note 241 and accompanying text.

262. Ryan, *supra* note 260, at 133.

263. Cover, *Nomos*, *supra* note 179, at 53.

264. See Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 852 (2011) (“[T]he constitutive approach holds that law, by its participation in the constitution of culture, also participates in the creation of the mind categories through which individuals perceive the social relations in which they take part—i.e., their status vis-a-vis other individuals, what others are entitled to do to them, what they are entitled to do to others, and the self-perceived identities of individuals and groups.”).

265. Justice Kennedy, speaking at Harvard Law School, related a story about how his concurrence in *Texas v. Johnson*, 491 U.S. 397 (1989), changed the outlook of an outraged citizen

caused by *Parents Involved* is not just the tangible fact that Seattle and Louisville cannot voluntarily integrate their schools, but the prospect that our citizenry will come to understand the project of school integration as an evil itself.²⁶⁶

I do not mean to suggest that people stand passive and awestruck in the face of assertions of constitutional meaning.²⁶⁷ People find creative ways to harmonize their commitments with the law in front of them.²⁶⁸ But the law and its defenders are allowed to be creative back,²⁶⁹ and so maintaining a position as an exile is difficult. Even Du Bois was broken (after ninety-plus years of struggle), and not every person is W.E.B. Du Bois. It is one thing to assert we should be “protestant” in our constitutional interpretation practices;²⁷⁰ it is another thing to hold to

who, as a prisoner of war in Germany, had risked a great deal to knit and preserve an American flag. Justice Kennedy concluded his remarks by saying: “The Constitution is the enduring and common link that we have as Americans and it is something that we must teach to and transmit to the next generation. Judges are teachers. By our opinions, we teach.” Lani Guinier, *Demosprudence through Dissent*, 122 HARV. L. REV. 4, 7 (2008).

266. We might be skeptical that seasoned civil rights warriors will come to doubt their positions simply due to Supreme Court say-so. But social movement accounts of constitutional change sometimes minimize the fact that, in many social controversies, large swaths of the American polity are simply neutral, and form their opinions based on signals sent by credible elite actors. See JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINIONS* 14 (1992); PAUL R. BREWER, *VALUE WAR: PUBLIC OPINION AND THE POLITICS OF GAY RIGHTS* 69–71 (2008). See also Schraub, *supra* note 259, at Part II.B.

I believe, though I cannot prove, that the implicitly understood moral indictment present in a hostile constitutional ruling accounts for the anger one sees in Justice Scalia’s *Romer* and *Lawrence* dissents. When the Court says laws that express disapproval towards homosexuals are violations of equal protection or due process, they are telling a considerable section of Americans (including, I imagine, Justice Scalia) that their deeply held moral commitments are at fundamental odds with our national charter. That when they register a belief in the immorality of gays and lesbians, they are acting against defining American values. And they know that enshrining this judgment through an actor with the signaling strength of the United States Supreme Court will have quite an impact on the mostly-neutral middle—persons whose views about homosexuality are not deeply held and are heavily reliant on how various positions are reflected in surrounding culture. See David Schraub, *The Perils and Promise of the Holder Memo*, 2012 CARDOZO L. REV. DE NOVO 187, 200.

267. See Mautner, *supra* note 264, at 856 (“[P]eople are not passively governed by law. Rather, as shown by many culture researchers, human beings are creative, manipulative, and enterprising. Therefore, the constitutive approach views individuals as often taking action to obstruct law’s imperatives and its allocation of rights and powers.”).

268. See, e.g., Charles R. Lawrence III, *Forbidden Conversations: On Race, Privacy, and Community (A Continuing Conversation with John Ely on Racism and Democracy)*, 114 YALE L.J. 1353, 1396 (2005) (proposing that, given judicial hostility to both affirmative action and school integration programs, “universities, as part of their affirmative action programs and in pursuit of their goal of admitting students knowledgeable about and experienced in issues of diversity, might prefer both black and white students who had attended integrated schools”).

269. Schraub, *supra* note 259, at 51–52.

270. See LEVINSON, *supra* note 184, at 29 (defining the “protestant” position with respect to constitutional interpretation as affirming “the legitimacy of individualized (or at least

that commitment in a meaningful fashion in the face of sustained orthodox efforts to suppress these alternatives. Constitutional divinity creates a sense of vertigo, as the exile attempts to maintain the conjunction between her dissident interpretation of the creed and her standing within a community that defines its constitution by reference to its justness.²⁷¹ One can protest, of course, but one has to fight past the inevitable retort: “If we are wrong, the Supreme Court of this nation is wrong.”²⁷²

Dominant purveyors of constitutional meaning—assisted by our veneration of institutions like the Supreme Court, which possess a privileged position in articulating that meaning—attempt to squelch the sustenance of these heretical constitutional visions.²⁷³ Law, backed by violence, attempts to force its targets to renounce their alternative vision of the world in favor of one imposed by those in power.²⁷⁴ Indeed, this would seem to be the message of more conventional readings of the Book of Job, where raw power eventually bludgeons Job into submission, forcing the renunciation of his most deeply cherished commitments in the face of overwhelming force.

To be clear, like Cover, I agree that the enforcement through violence of particular moral or cultural prescriptions is not necessarily a bad thing—“[v]ery often the balance of terror in this regard is just as I would want it.”²⁷⁵ That Governor Faubus was eventually forced to yield to the rifles and bayonets of the National Guard is a good outcome, and plenty of times it is someone like Governor Faubus who is

nonhierarchical communal) interpretation”); BALKIN, *supra* note 188, at 10 (arguing that “constitutional legitimacy” depends on “constitutional protestantism”).

271. Ironically enough, this may become more difficult the more often the Constitution does properly instantiate norms of justice. If one thinks that the Constitution sanctions a great many injustices, one is unlikely to be dazzled by claims of constitutional omnibenevolence. By contrast, if one generally sees the Constitution as presently articulating a just world, there is greater dissonance when trying to argue the exception. See JAMES BALDWIN, *THE FIRE NEXT TIME* 115 (1963) (describing African-Americans’ “great advantage of having never believed that collection of myths to which white Americans cling”).

272. See Martin Luther King, Jr., Address to 1st Montgomery Improvement Association Mass Meeting, at Holt Street Baptist Church (Dec. 5, 1955) (transcript available at http://mlk-kpp01.stanford.edu/index.php/kingpapers/article/address_to_first_montgomery_improvement_association_mia_mass_meeting_at_hol/).

273. See Post, *supra* note 177, at 56 (“When constitutional law intervenes in an ongoing cultural dispute about the meaning of the Constitution, it both draws strength from those who agree with the Court’s vision of the Constitution and displaces the views of those who disagree with the Court’s understanding.”).

274. See Cover, *Violence*, *supra* note 181, at 1603 (drawing an analogy to the practice of torture, and the torturer’s typical demand that the victim engage in an act of betrayal to solidify the end of the victim’s nomos and its replacement by one created by the torturer).

275. *Id.* at 1608.

registering the protest. But that was the outcome; though sometimes less starkly demonstrated, it describes the balance of power between (dissident) citizen and state, and insofar as we can conceptualize the existence of sympathetic constitutional exiles, it drives home the gravity of the situation they are in.

C. Protest and the Divine Constitution

“Fidelity to the Constitution,” Jack Balkin writes, “requires faith in the Constitution.”²⁷⁶ Otherwise, why bother? If one does not believe in at least the potential for the Constitution to create and sustain a just social order, then the proper move is to abandon it, not reform it.²⁷⁷ In order to *use* authority, a constitution must first *gain* authority.²⁷⁸ Having gained authority, it must maintain it. If everyone abandons the law, it is a literal dead letter. Law depends on the faith of its subjects that it can adequately account for their experience and values. Law “is given cogency and support by the ongoing story of the community that seeks to live by the law.”²⁷⁹

The narrative meaning that sustains law can also be deployed to “speak back” against it.²⁸⁰ This is not because the narrative bears only one conclusion that the law is “violating”—much the opposite, it is because the narrative has many conclusions that the law cannot wholly contain.²⁸¹ The law is not intrinsically just, but neither is it intrinsically unjust. Constitutional faith is predicated on the belief that the law *can be appealed to* in the language of justice.²⁸² In making this appeal, we do not discover the “true” Constitution. We do, however, exert an

276. BALKIN, *supra* note 188, at 2 (emphasis omitted).

277. William Lloyd Garrison did not revere the Constitution; he attacked it as “a covenant with death, and an agreement with hell.” *Id.* at 5. If one truly believes that the Constitution is unsalvageable in its evil, then there is no reason to grant it any respect whatsoever. More recently, Louis Michael Seidman has argued passionately in favor of “constitutional disobedience,” concluding that the Constitution is so irredeemably flawed as a document that we should, in many cases, stop paying heed to it. LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE 9–10 (2012).

278. WALTER BAGEHOT, THE ENGLISH CONSTITUTION 5 (1867).

279. Tucker, *supra* note 134, at 19. See also Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2016 (2012) (“The Constitution is law today because it continues to be accepted today.”).

280. Adler, *supra* note 8, at 184 (“It is always possible, therefore, that the meaning-component upon which law depends will rise to accuse it . . .”).

281. See Cover, *Nomos*, *supra* note 179, at 18 (“Precepts must ‘have meaning,’ but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking.”).

282. See BALKIN, *supra* note 188, at 121 (“Our Constitution is like ourselves, deficient, fallible, a collection of moral and political compromises, yet with the urge and the ambition to become better than it is now.”).

impact upon it that holds out the possibility of change, hopefully change for the better.²⁸³

1. Success

Law is not unchanging, and formal amendment processes are not the only way law evolves. Scholars who have examined the impact of social movements on legal development have persuasively argued that legal meaning is responsive to pressure put upon it by mass movements. For example, Reva Siegel argues that even though the Equal Rights Amendment (ERA) was never actually ratified, the mobilization that surrounded the issue of women's rights nonetheless exhibited a dramatic impact on the Supreme Court's sex jurisprudence, giving us a "de facto ERA."²⁸⁴ The shifts in abortion jurisprudence in the years following *Roe v. Wade*²⁸⁵ and *Planned Parenthood v. Casey*²⁸⁶ offer a similar template of popular mobilization leading to noticeable doctrinal change.

If one views the Constitution as a purely positivist document, this evolution is hard to justify. The entire point of positivism is to try and separate "the 'legal' question of what law *is* from the moral or political questions of what law *ought to be*."²⁸⁷ Certainly, as a theoretical matter this understanding of the constitutional role has widespread appeal—both in the public and in the courts.²⁸⁸ But the fact that we can observe

283. *See id.* at 119 (rejecting the idea that the Constitution is inherently just, while arguing that the belief in its potential justice allows us to "manufacture" fidelity to it). As Patricia Williams wrote with respect to how American Blacks viewed the promise of constitutional rights:

To say that blacks never fully believed in rights is true. Yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before; we held onto them, put the hope of them into our wombs, mothered them and not the notion of them.

PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 163 (1992).

284. *See generally* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006).

285. *Roe v. Wade*, 410 U.S. 113 (1973).

286. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

287. Steven D. Smith, *Why Should Courts Obey the Law?*, 77 GEO. L.J. 113, 123 (1988). *See also* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 184 (5th ed. 1998) (objecting to "the prevailing tendency to confound what is with what ought to be law").

288. *See, e.g.*, John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 935 (2000) ("Not only is the 'legal' factor a significant predictor of court evaluation . . . , but . . . beliefs that the Court makes its decisions on the basis of ideology, partisanship, or pressure from the other institutions significantly detract from evaluation of the Court."); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 272–73 (1997) ("There is a widespread belief, held by the courts themselves, that the legitimacy of judicial decisionmaking depends upon the belief that it is based on precedent and not politics.").

social-driven constitutional change indicates that the American people are not satisfied with a purely positivist constitution.

In part, this may be a result of conceptual difficulties: the very project of having a legal system implies some judgments about the rule of law, enforceability of legal mandates, democratic accessibility, and other like questions.²⁸⁹ But in part, it is also because many legal questions—even in their positivist dimensions—carry with them a key normative core.²⁹⁰ Courts are asked to decide what constitutes “equal protection,” what process is “due,” what punishments are “cruel and unusual.” It is difficult to even conceive of how to approach such questions without at least speaking to the moral commitments that undergird such legal clauses. Finally, Michael Perry argues that Americans believe strongly in the existence of a moral code beyond the vagaries of day-to-day politics; one they expect the courts to enforce even in absence of a clear textual or originalist mandate to do so.²⁹¹ When courts abstain from this endeavor, it is far from clear that the average citizen will be satisfied by the apologia that the courts are simply calling balls and strikes. The vision of judges making decisions completely disconnected from whether they are just in some ethical sense may be abstractly appealing, but there is little evidence that its popularity persists when its effects are made concrete.²⁹²

Hence, the whole reason that social-driven constitutional change is even possible is because of a particular sort of understanding of the Constitution and our relationship to it that echoes Burt’s conception of God and the Jewish people’s relationship to him. The reason these arguments have even a chance at succeeding is because we do not see the Constitution as existing external to our own considerations of

289. See PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 184–85 (1991) (arguing that the Constitution is generally agnostic to questions of values except via providing structures through which our political morality can be effectively instantiated). See also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that judicial review is justified when necessary to preserve an open democratic process); LON L. FULLER, *THE MORALITY OF LAW* 34–38 (1964) (presenting various norms and policies that need to in place for a purportedly “legal” system to be recognizable as one).

290. See MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 6–12 (2004) (observing that it is difficult to understand why law regulates and proscribes what it does without referring back to some account of emotional and moral appraisals); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8 (1986) (“[E]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals.”).

291. MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 97–102 (1982).

292. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 96 (2003) (observing that the hostile reaction to the nomination of Judge Robert Bork to the Supreme Court belies the notion that what the American public desires most of all is a consummate formalist).

justice. Pro-lifers see *Roe* as the Constitution instantiating a wrong. They have mobilized against it, even in the face of Supreme Court decisions that explicitly tried to declare an end to popular resistance on the subject.²⁹³ In doing so, they have affected the public's perception of the relationship between the Constitution and abortion rights, as well as the governing Supreme Court doctrine on the subject.²⁹⁴ The Pro-lifers have appealed to our structures of constitutional governance of the language of justice, and consequently have received, to varying degrees, a considerable retreat from the *Roe* regime.

2. Failure

The story I have told thus far of protest theology is one of triumph. Job does not in fact back down, God concedes wrong, and together they rebuild their relationship in a way that is mutually respectful to both. One hopes that constitutional protest can work the same way, with even excluded groups able to use the language of constitutional promise as a mechanism for mending past wrongs and recreating a covenantal promise.²⁹⁵

But it is important to emphasize that these appeals do not necessarily succeed. Sometimes—perhaps often—the dominant vision successfully maintains itself in the face of these rebellious challenges.²⁹⁶ Its power is often sufficient to crush these alternatives outright, forcing recantation as God demanded of Job. After all, even if one accepts my reading of Job that he does eventually prevail, his is not the only story of the Bible. For Abraham and Moses, the end result is distancing—the relationship collapses. Burt says that Moses's decision to strike the rock rather than speak to it presaged his “divorce” from God (pp. 128–29). This sets the stage for the Book of Deuteronomy, which is different from the prior books in that it contains no verbal exchanges between God and Moses, implying “that some considerable unaccustomed distance had come between God and Moses—in a way

293. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 867 (1992) (describing the Court's abortion jurisprudence following from *Roe* as “call[ing] the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution”).

294. BALKIN, *supra* note 188, at 64.

295. See Rogers, *supra* note 238, at 190 (“The divergence between the people as they *were* and as reformers longed for them *to be* created a space for potentially mending fractures at the core of the polity, a space in which the political and ethical standing of the excluded might subsequently be affirmed.”).

296. As a practical matter, it has to succeed at least some of the time—persons living in a purely paidic world “would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions.” Cover, *Nomos*, *supra* note 179, at 16.

reminiscent of the absence of any conversation between God and Abraham in Genesis after” the *Akedah* (p. 146).

The biblical tale of Korach (who goes unmentioned in Burt’s book) provides perhaps the polar opposite account to my rendition of Job. Korach is portrayed as one of the Bible’s great villains (at least, among the Israelite people).²⁹⁷ Balkin takes for granted that Korach is a wrongdoer—an example to be avoided by “faithful” constitutional practitioners.²⁹⁸ Korach, leading a group of community chieftains, “assembled against Moses,” alleging that he had raised himself up above the other Israelites even though all were said to be members of a holy nation.²⁹⁹ In response, Korach and his fellows were literally swallowed up by the open earth,³⁰⁰ an act that was followed by a divine plague that killed another 14,700 Israelites.³⁰¹

Obscured in this account is Korach’s alleged offense. Korach is no ordinary rabble-rouser. By tradition, he was considered a great sage of the Torah,³⁰² and his followers included some of the most prominent members of the Israelite community.³⁰³ Traditional accounts indicate that Korach bore a personal grudge against Moses and greatly expanded the scope of their dispute to cover proper interpretation of several Biblical commandments.³⁰⁴ But in the Bible itself, the only claim Korach makes is that Moses has elevated himself above the rest of the people Israel, hoarding a coveted position next to God that ought rightfully be shared with the entire community. There is no threatened or enacted violence, nor any claims that show facial disrespect to God or the divine covenant. To the extent that Korach is “rebellious”—and this is Moses’s framing, not Korach’s³⁰⁵—it is an intellectual rebellion, made with words rather than violence.³⁰⁶

Moses replies to Korach by instructing him to lay out an offering of incense alongside Moses. Whichever incense offering God chooses,

297. See ALTER, *supra* note 95 at 762 n.1 (describing Korach as “the archetype of the presumptuous rebel against just authority”).

298. See *supra* note 232.

299. *Numbers* 16:1–3.

300. *Numbers* 16:31–33.

301. *Numbers* 16:49.

302. *Bamidbar* 18:2.

303. LOUIS GINZBERG, LEGENDS OF THE BIBLE 440 (1956).

304. See *id* at 440–42.

305. See *Numbers* 16:11 (“For which cause both thou and all thy company are gathered together against the LORD: and what is Aaron, that ye murmur against him?”). See also JONATHAN KIRSCH, MOSES: A LIFE 301 (1998) (“Indeed, the essential message of the Bible is that defiance of Moses and defiance of God were one and the same . . .”).

306. See Schraub, *Our Holy Grandfather*, *supra* note 84 (“Korach, by comparison, resorted to no weapons and inflicted no casualties. His was an intellectual insurrection . . .”).

“he shall be holy.”³⁰⁷ Given these slanted parameters, the result was unsurprising: Moses was selected, and Korach was obliterated. In this way, effectively the sole response given to Korach’s challenge is his grisly demise—an argumentative style seemingly more appropriate to Sir Geoffery de Tourneville than the holy divinity.³⁰⁸ Korach’s fate demonstrates the gravity of Job’s grim promise: “Though he slay me, yet will I trust in him: but I will maintain mine own ways before him.”³⁰⁹

It is rare for the American republic to respond to dissident voices in quite so volcanic a fashion. But in less literal terms, Burt’s framing of the political relationship (reflected through Biblical theory) implicates how relationships can and cannot persist given vastly asymmetric power. Job’s argument, for Burt, is that God does have the power (if he chooses) to squelch dissent entirely. But that power also destroys the relationship God wants (p. 174). Ultimately, either prospect is a real possibility. Protest theology holds forth the possibility, but not the promise, that appeals in terms of justice might succeed. Even where they fail, though, one can find value in the challenge itself.³¹⁰

At least in his lifetime, Du Bois failed in his appeals. It is altogether unclear whether Frederick Douglass’s faith in the capacity of the Constitution to secure racial justice has won out over William Lloyd Garrison’s belief that it was irredeemably corrupted—certainly it did not before Douglass died.³¹¹ Critical Race Theory as a field developed because of a belief that racial inequality was reestablishing itself—and the Constitution itself was enabling the retrenchment.³¹² Can we say, after *Parents Involved*, that we will see vindication in our lifetimes? Maybe. Maybe not.

307. *Numbers* 16:7.

308. To wit: “The clinching proof of my reasoning is that I will cut anyone who argues further into dogmeat.” JOHN LLOYD & JOHN MITCHINSON, *IF IGNORANCE IS BLISS, WHY AREN’T THERE MORE HAPPY PEOPLE?: SMART QUOTES FOR DUMB TIMES* 187 (2009).

309. *Job* 13:15.

310. See Cover, *Violence*, *supra* note 181, at 1604 (“Martyrs insist in the face of overwhelming force that if there is to be continuing life, it will not be on the terms of the tyrant’s law.”); Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363, 379 (1992) (“Mrs. MacDonald avoided discouragement and defeat because at the point that she determined to resist her oppression, she was triumphant. Nothing the all-powerful whites could do to her would diminish her triumph.”).

311. See BALKIN, *supra* note 188, at 48–50.

312. See, e.g., Bell, *supra* note 310; Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 *HARV. L. REV.* 1331 (1988). For an overview of Critical Race Theory, see RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2001).

3. Restoration

Burt's book, and his particular articulation of the process by which humans and God relate to one other, provide us with a new way of understanding our collective relationship with the Constitution. The claim that the Constitution occupies a quasi-religious status in American society is hardly new. But this view is easily tied up in certain orthodox religious presumptions—that to be a religious divinity is to be perfectly just—that need challenging. The need to preserve the mystique of the Constitution renders it opaque and ultimately stunts a full and fruitful relationship with it.³¹³ Burt's theory provides considerably explanatory force for how we feel about the Constitution—in particular, our ambivalence when it feels as if the Constitution sanctions grave injustice. We simultaneously want to reject the premise that the Constitution can bring about evil (rejecting the legitimacy of even dominant interpretations that would have this effect), while feeling a sense of anxiety and fear that these interpretations may well be true—and thus, that the Constitution has turned against us.

This concern can be dissipated, though not eliminated, by the recognition that the Constitution is not a static entity—it can and does change in response to American response. In this way, many potential constitutional visions all can claim to be constitutionally true—“these and these.”³¹⁴ This cuts both ways—it is not the case that, when the Constitution acts to exclude or oppress, it is a “fake” or inauthentic constitution. Our faith is not in the premise that the Constitution, properly construed, is always just. It is in the belief that the Constitution can be appealed to in the language of justice—that it will be responsive to our prayers. The question, then, is how our relationship with a “divine” Constitution can persist when one does not believe it must always be just. Doesn't this concession eliminate its divinity? Protest theology and Burt both allow us to answer no. We still can maintain a relationship with a divine constitution—a healthy and meaningful one—even in the face of challenging admittedly legitimate constitutional commitments.

Balkin's vision of a nation of constitutional “protestants” is an appealing one. But it will be a stilted faith so long as it does not tackle the presumption that veneration of the Constitution comes because the

313. See BAGEHOT, *supra* note 278, at 86 (warning that “[w]e must not let in daylight upon magic”); GREENBERG, *supra* note 49, at 40 (blaming the impoverishment of modern prayer on its inability to express anger and rage towards God); MAGLIocca, *supra* note 198, at 734 (“[L]awyers often act as if the Constitution is a religious text. And the maintenance of its sanctity is the only real constraint on what the Supreme Court and theorists like Balkin do.”).

314. See *supra* note 167.

Constitution necessarily instantiates ideals of perfect justice, and that we revere the Constitution because it represents some abstract ideal of a social contract. It does not, but that matters less than one might think.³¹⁵ We come to the Constitution not as strangers, but as partners—partners who care about the fabric of the American covenant and wish for it to persist. Our tie to the Constitution is not dependent on it being an emblem of perfect justice, but it is tied to the process by which we feel as if we can influence it and speak to it, and that it will respond in turn. Properly situating the origin of our constitutional commitment allows us to speak freely to the Constitution, without a feeling of heresy or abandonment. It allows for the relationship to survive and persist, even when it feels like by all rights the covenant should be broken.

CONCLUSION

The Bible is a foundational document of Western moral and political thought. The relationship it forwards between the divine sovereign and his subjects, as Burt compelling documents, is not one of perfect harmony—or even the realistic prospect of such harmony. Rather, it is a deeply confrontational relationship that is characterized by both parties pressing the other towards just and fair treatment, and both parties falling short. What keeps the relationship intact is not the assumption that perfect justice will be achieved, but rather sentiments of care and concern that make the relationship meaningful and worth preserving even in spite of its failings. A relationship of this sort, however, cannot reach its full fruition insofar as we are deceived into believing that the dominant player's assertions of reality are intrinsically just, right, or true. Our relationship is sustainable only insofar as we are willing to hold our partners to their promises.

Our relationship to our Constitution is quite similar. Like God, we believe that the Constitution should relate to us justly. Like God, sometimes it does not, and we are left feeling hurt and betrayed—as in each case we hold the presumption that the entity speaks in terms of justice and thus, what we feel in our hearts is a wrong, which is coded to the public as a right. When placed in this position, one option is to simply abandon the Constitution as not worth our time—unworthy of our allegiance because it fails in its core ambition. Yet many of us find

315. Cf. Allison M. Jaggar, *Caring as a Feminist Practice of Moral Reason*, in JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS 179, 180 (Virginia Held ed., 1995) (offering “care thinking” as an alternative to “justice thinking”—the latter preoccupied with impartial application of universal principles, the former instead focusing on particular issues made salient by a posture of “empathy, openness, and receptiveness”).

ourselves still drawn to the Constitution, for the same reason the post-Holocaust Jews have not abandoned Judaism. It is a community of meaning to us, and we cannot lightly walk away. Standing yet before the Constitution and attempting to steadfastly maintain faith through dissent is a difficult endeavor, and one that we must admit has only mixed success.

I have in the course of this Review analogized constitutional dissidents to biblical characters ranging from Abraham to Job to Korach. In our ongoing constitutional drama, we see all of these roles played. Sometimes we're Job, ultimately successful in achieving change and renewal. Sometimes we're Korach, crushed and devoured in a raw display of power. Sometimes we're Abraham, able to stand for a time to assert what is right, but ultimately falling mute. And sometimes we're none of these—we're Orville Faubus, and we deserve to lose.³¹⁶ The issue here is not how often dominant constitutional norms are deservedly resisted, any more than the point of protest theology is to say that God is always or nearly always abusive. It is simply taking that first step—rejecting that the divine nature of the Constitution gives it infinite license, then rejecting that this rejection forces one to abandon the constitutional community as a whole. The Divine Constitution exhibits a pull on us because it is our constitution and constitutive of our community. It does not have legitimacy because it is inherently right about all things. We come to the Constitution already bound to it, already feeling as if it is ours and desiring that it enable our full freedom and flourishing as human beings. Most of us, at least, cannot walk away. So we try to make it better.

316. See Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1398 (2006) ("People—including members of topical minorities—do not necessarily have the rights they think they have. They may be wrong about the rights they have; the majority may be right.").